

# American Bar Association Journal

JUNE 1956 • *Volume 42* • *Number 6*


## *This Month's Cover*

The drawing on our cover this month shows the features of Mohammed (570-632), the founder of Islam, the religion of more than 315,000,000 people. He abandoned his career as a caravan conductor in Arabia after his marriage with a wealthy widow fifteen years his senior. Thereafter, he founded Islam, claiming to be the mouthpiece of God. The new religion achieved success with rapidity and soon became the great rival of Christianity in the Near East, Northern Africa and Eastern Europe. The line sketch of the Prophet is by Charles W. Moser of Chicago.

# June, 1956



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# The President's Page

E. Smythe Gambrell

▪ In flight between engagements in New Orleans and Washington, I am reminded that today is May 1, the printer's deadline for the June issue. It disturbs me to realize that eight months of my allotted year have slipped away, and that so little time remains in which to try to express my appreciation for the opportunity you have given me.

Our professional history began in response to social needs a thousand years ago. In these days of increasing complexity, diversity and interdependencies, society more than ever needs law—law wisely conceived and effectively administered. What a glorious privilege it is to be commissioned as high priests of the law. What better duty or opportunity could one desire? As Justice Cardozo expressed it:

> Law in its deepest aspects is one with the humanities and with all things by which humanity is uplifted and inspired. . . . Law is not a cadaver, but a spirit; not a finality, but a process of becoming; not a clog on the fullness of life, but an outlet and a means thereto; not a game, but a sacrament.

It cannot be denied that over the years lawyers occasionally have been remiss in their stewardship of a great profession. We have not been as progressive and energetic and resourceful in improving law and its administration as some tradespeople have been in the pursuit of their commercial occupations. Even though we have been proud to claim a preferred and privileged status in a field protected against lay encroachments, we have not exerted ourselves to keep justice and its procedures abreast of the times, and both lawyers and the public have suffered as a result of this. It was my good fortune to be given an opportunity this year, at a time when lawyers, judges and law teachers seem suddenly to have come to realize that our profession may be lost to us and to society unless some corrective action is taken.

We have just completed the first formal phase of our great mobilization campaign, which was commented upon here a month ago and more recently in another publication of the Association. The results were more than gratifying—they were electrifying! But that is only the beginning. In the language of Shakespeare, "What's past is prologue". Under the able and aggressive leadership of Campaign Chairman Cecil Burney and the members of his Executive Committee, the circuit chairmen, the state and metropolitan chairmen, the county and local chairmen, and the team workers and the staff workers at the Bar Center, it has been demonstrated that the lawyers and judges and law teachers of America not only are willing but are anxious to meet their public obligations and do whatever may be necessary to retrieve the loss of position which the profession has suffered lately. More than 10,000 members of our profession at substantial cost of time, effort and inconvenience, did the job in this first phase of our renaissance, and to them goes the credit. How I wish it were possible to thank each of them for their labors. As this is impossible, I hope that this comment and the detailed news releases will be accepted as expressions of our gratitude.

The old members and the new members are reminded that at 8:00 A.M. on Monday, August 27, at the opening of the Annual Meeting in Dallas, we are to have a specially featured "New Members Breakfast" in the Main Ballroom of the Statler-Hilton Hotel, at which we desire to properly recognize the various groups and individuals for their magnificent campaign performance, and also meet the new members. We shall counsel together on ways and means of completing our job and making the Association stronger and its program fuller and richer for the benefit of the lawyers and the public. All who had a part in this campaign, and all who were brought into membership and all who already were members are cordially invited to make their advance registrations for this breakfast so that this opening event of the 1956 Annual Meeting will be a memorable occasion.

The Oslo Conference of the International Bar Association, July 23-28, 1956, promises to be the most significant in the history of that organization. It is understood that, in addition to approximately forty delegates appointed from our Association, many other members of the profession from this country will be in attendance there. On the way to Oslo, I hope to have the pleasure of visiting England, Scotland, Ireland

and France in the interest of our 1957 meeting abroad.

In the past month, I have revisited Dallas in connection with plans for our 1956 Annual Meeting. In addition to its promise of preeminence in content, size, splendor, convenience and comfort, it will feature "home hospitality" and will endeavor to see that every visitor crosses the portal of one of the lovely Dallas homes where gracious living is at its best. Those expecting to attend the Dallas meeting should send in their requests for registration and hotel accommodations without delay.

If you have overlooked mailing your registration for the 1957 London Meeting, you are urged to do so at once, as only those applying before July 1, 1956, can be considered in the plans. The rising enthusiasm for this pilgrimage, which will include, in addition to meetings in many of the "great places" in London, a special ceremony at Runnymede nearby, and possibly meetings in Ireland, Scotland, France and Italy, clearly indicates it will be the most significant gathering of the legal profession in the history of mankind. The March and May issues of the JOURNAL gave the information needed in applying for registration.

Locally, nationally and internationally, there is unmistakable evidence that lawyers, judges and law teachers have become aroused and are determined to discharge their responsibilities to the public and to themselves. May I share with you the following interesting visits during the past month:

At the Annual Meeting of the Kentucky State Bar Association in Louisville I enjoyed the good fellowship of President Selden Trimble, and Blakey Helm, member of our Board of Governors, and State Delegate Edward A. Dodd, Delegates Ben Fowler and Marion Moore, and many other state and local bar leaders who dispensed the traditional Kentucky hospitality.

The Annual Meeting of the South Carolina Bar Association at Spartanburg brought together in happy conviviality hundreds of old friends in my native state. President Calhoun Mayes, Delegates Walton McLeod and Frank Gary, President-elect David Robinson and former presidents, Frank Watkins and Sam Watt, and others too numerous to mention, were most gracious to me.

The meeting sponsored by The Association of the Bar of New York City for co-operation with the International Commission of Jurists, included a delightful reception followed by a dinner given by President Allen T. Klots, which in turn was followed by a speaking program featuring Dr. A. J. M. vanDal, Secretary General of the Commission. Such events mean much in the strengthening of liberty under law in the free world.

Law Day Exercises at the University of Utah in Salt Lake City revealed the high character of that institution under the leadership of Dean Daniel A. Dykstra. State Delegate Franklin Riter gave a beautiful luncheon attended by the Governor, the Chief Justice and numerous other public and professional leaders. He and Dean Dykstra and Delegate Leland Cummings accorded to me every courtesy. The hospitality included the Law Day Banquet and numerous social interludes.

The dedicatory exercises for the magnificent new law building at the University of Illinois extended over a period of several days, and were a fitting climax to the teaching career of Albert J. Harno who has served as Dean at Urbana with great distinction for thirty-four years. Many noted lawyers, judges and law teachers from all parts of our country were present for this important occasion. Illinois is among the law schools which have gone beyond teaching merely what the law is and have added a creative function devoted to building up a sound philosophy, a jurisprudence, and a body of informed opinion to which lawyers, law makers and judges may look for inspiration and guidance. Such schools not only produce practical lawyers, but also go into the essence of law itself and the ends and aims it must serve.

The Northeastern Regional Meeting at Hartford, having Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut and New York as its constituency, was a notable success under the general leadership of Charles S. Rhyne and the regional and local leadership of Cyril Coleman, Charles Pettengill, Charles Lyman, Richard Bowerman, Allen Brown and many state and city bar executives. Approximately 1,000 lawyers, with their wives, assembled to make this three-day session one of the great regional meetings in the history of the Association. The inspirational speeches, informative institutes, and rare fellowship, hospitality and entertainment at Hartford will long be remembered.

The Inter-American Bar Association Meeting in Dallas brought together several hundred lawyers, judges and law teachers from twenty-one republics of the Western Hemisphere, under the gifted leadership of President Robert G. Storey and Dr. Eduardo Salazar and a score of other distinguished men of the law. This meeting, which extended over several days, was addressed by some of the world's great leaders and undoubtedly will have its cultural impact throughout the Americas.

Law Day Exercises at the University of South Dakota in Vermillion reflected the fine, wholesome and progressive educational atmosphere of this typically American institution under the leadership of Dean Oval A. Phipps and his capable faculty. State Delegate Roy E. Willy, former Chairman of the House of Delegates, very graciously met me at Sioux Falls airport and extended to me the hospitality of his progressive city, including a beautiful luncheon to which he invited all members of the Association resident there. He and Mrs. Willy later took me seventy miles to Vermillion for the re-

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# American Bar Association Journal

*the official organ of the*

AMERICAN BAR ASSOCIATION

*published monthly*


The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Insurance Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral Law, $5.00; Municipal Law, $3.00; Patent, Trade-Mark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $3.00; Taxation, $6.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois.

**American Bar Association**

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# Views of Our Readers

**▪ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

## *Judge Younger's Article Left Him Cold*

▪ I have just finished reading Judge Younger's article in our February issue entitled "Capital Punishment: A Sharp Medicine Reconsidered." I am sorry, but Judge Younger's logic leaves me, for one, cold. The truth is that even in this great country there are but few who legislate or administer the laws who act solely for the general public good. So long as we approach the matter of crime and criminals, particularly the vicious, adult and juvenile, from the standpoint of the welfare of the criminal, we shall have a growing criminal problem.

The facts are, as shown by statistics, that two thirds of our crimes of violence are committed by repeaters. If these repeaters, on conviction had been handled from the standpoint of public good, it is quite apparent that our crime troubles would be more than halved. What place among us is there for the fellow who has committed armed robbery, murder or rape? A fellow should not be entitled to any bag limit in these crimes—the do-gooders to the contrary notwithstanding.

FORREST ANDREWS
Knoxville, Tennessee

## *He Applauds Judge Younger*

▪ May I join in the applause of Judge Younger for his article in the February issue on capital punishment?

I sometimes wonder whether we are less bright than the physical scientists. Tell them what is wanted and in a few years they deliver an atom or hydrogen bomb, or whatever. We lawyers have had a part in trying to control homicide for centuries. Things just get worse.

One difference may be that the scientists know what is wanted. We don't.

Judge Younger's conclusion is that the death penalty will be retained where it now exists until it is proved not to be the most effective deterrent for murder. This implies that its purpose is to prevent murder. I doubt it. I doubt that I would feel any less like killing a murderer if I knew that no one would ever hear of his execution. And Judge Younger points out that not only do our methods of administering the death penalty belie a deterrent purpose, but also that the evidence does not establish that it is an effective deterrent and that there is sober and informed opinion that it actually causes murder.

I should like to add that punishment, whether vindictive or deterrent, must be measured by notions of fault, severity and leniency that are themselves immeasurable.

The only measure for punishment I have heard of that is capable of being objectively applied is to keep prisoners under whatever degree of restraint is necessary until they are fit to live in free society. A recognition of that truth would not only give us a measure for punishment but would also give us one definite, dominant, aim—the prevention of crime. We would know what is wanted. Isn't that the thought back of the letter of Fred Armstrong, in the December issue? Such a measure would eliminate the troublesome question of *why* a man is dangerous (such questions as whether it is his own fault or that of society or of his breeding) except so far as relevant to the $64.00 question, namely whether a man *is* dangerous.

Judge Younger demonstrates the truth of another proposition which I should like to make explicit: the death penalty cannot be decently administered. It corrupts criminal law and procedure by spreading the false notion that we can select in advance which men are hopeless and by turning our trials into "spectaculars". I say nothing of its barbaric, primitive ferocity of which Judge Younger so strikingly reminds us. He points out that humane efforts to be sure it is applied only in proper cases have made executions into lingering deaths drawn out to sixteen months on the average. No wonder the trend is clearly toward the abolition of the death penalty. The feeling against it is so strong that it cannot be applied with even a semblance of equality, or often enough to make the murderer's risk of it more than about 1 in 50 or more.

Judge Younger listed the arguments pro and con without always clearly indicating which of them he thought sound. It seemed to me that he favored the abolition of the death penalty. His conclusion, expressed as such, however, was surprisingly narrow, namely, "I neither propose nor predict the early abolition of the death penalty." As to that, an English author in the *New York Times Magazine* of January 8, 1956, said: "The most obvious argument against abolition is that public opinion is not ready for it . . . The abolitionist's answer to this is to point out that no penal reform ever had the support of public opinion, that reformers in this field have to lead the public and not follow it."

A. L. GAUSEWITZ
University of New Mexico
Albuquerque, New Mexico

### *He Liked the Article on the Public Defender*

■ I read with great interest the article by Edward J. Dimock, "The Public Defender: A Step Towards a Police State?" It is a noteworthy article and is worthy of the consideration of every practicing attorney.

It rightfully directs attention to the duty of a lawyer to act independently and stand upon honor to do so. Integrity, courage and the desire to fight and defend those who are indigent and cannot afford counsel, as contrasted to the horse-trading and the rationalization so obviously the part of the role of the public defender.

More articles of this nature would be helpful.

E. FRANKLIN PAULEY
Charleston, West Virginia

### *Another View of the Specialization Problem*

■ I have read a great deal recently in law publications about so-called "specialization" in the practice of law, including the excellent article by Professor Joiner in the December, 1955, issue of your JOURNAL. In all this discussion I have found no mention of what I consider the vital and paramount consideration, and which is simply this: It is impossible for a lawyer whose entire practice has been confined to one particular subject matter to be a well-equipped lawyer.

Laymen can not understand that in any kind of a case, which they think should be given to a lawyer who has only that kind of cases, there may be involved questions and legal principles brought in from any other of the myriad branches of the law, and underlying principles so deep that the "specialist" does not recognize their presence. He is taken up with practice details, statutes, rules and regulations, and when a case really involves a question which has never before been presented in his practice, nor thought of by him, but arises in some other branch of the law in which he has had no experience, he not only is not really well qualified to deal with it, but only too often he does not know that it is there. There may be several such questions, or a nest of them.

When a layman finds himself involved in a law case of any kind, he should take it to the best lawyer that he knows or can find. Then if it is deemed advisable to employ a "specialist" (as it so often is nowadays), it should be only by the advice and direction, and under the supervision of the real lawyer. That is the only way in which the client can get the best legal service; it will not increase the expense to the client, but on the contrary, a case might well arise in which it might substantially reduce

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the expense. Neither will it harm the "specialist". On the contrary, it is for the mutual advantage of general practitioners and "specialists" that there should be the closest co-operation and confidence between them. They each have their own sphere, by co-operation they can minimize the work, and it is harmful and absurd to put them in the position of competitors or rivals in getting business. They ought to help each other.

The parallel to the medical profession, so ably treated by Professor Joiner, is very close. I think almost everyone knows that medical specialists have many times performed operations, sometimes serious ones, which were afterward found to be mistaken, unnecessary or harmful, simply because the real cause of the patient's complaint was something which did not fall within the specialty of the specialist, and which he did not diagnose. Perhaps still more often the specialist has been headed off from performing just such an operation by the family physician who had charge of the case, or possibly by a general practitioner called in to get his advice. The family physician is the real, solid stand-by.

In the present agitation about specialization in the law, my sole object is to call attention to a consideration which I regard as the paramount one, formulated at the beginning of this letter, which I have not seen mentioned in the voluminous discussion, but which ought to be constantly borne in mind in searching for a solution.

LEONARD B. SMITH

New York, New York

### *Adoption and Social Welfare Agencies*

■ We are interested in Mrs. Kampelman's letter in the May issue, commenting on our article titled "Lawyers and Adoption: The Lawyer's Responsibility in Perspective", in the December, 1955, issue. Although her points were somewhat sharply made, she gives expression to a viewpoint which is widely held but which is based on certain misconceptions. These are that social agencies are eager to garner to themselves all power in the field of adoption, that social workers regard themselves as infallible in their wisdom, and that adoption applicants with initiative and gumption do not apply to agencies.

As we pointed out in our article, adoption is a legal process and its control is in the hands of the legislature, the courts and the Bar. The time is not too remote when children, herded in nurseries and asylums, could be paraded before adoptive applicants and chosen according to eye-appeal rather than on the basis of some consideration of the needs of the child and of the family. Many families had unhappy experiences in attempting to rear the children they selected, and many children remained dependent on the community as adults because no family came along to rescue them from institutional living.

Social agencies grew out of the conscience of the community which saw a need for some orderly process for bringing together children in search of parents and would-be parents who wanted help in finding children. Social agencies were brought into being by responsible and varied groups in each community, by representatives of many professions who formed their governing boards and directed their programs.

What is the alternative to agency placement? What other orderly process has been proposed? First come, first served? Free competition by some 900,000 for 90,000 children? Cash and carry placement with the child going to the highest bidding family? Without orderly community process in adoption, practices repugnant to human decency flourish. Placement through social agencies remains the only orderly non-governmental process in the adoption field, and though its performance falls far short of ideal, it is the best tool currently devised.

We did not think it necessary to state the obvious, that social workers are no more infallible than members of any other profession. They realize the difficulty of the task assigned them by the community and few other groups have subjected themselves to the kind of intensive self-scrutiny embodied in the National Conference of Adoption held in Chicago last year under the auspices of the Child Welfare League of America. Experts from all of the allied professions, religion, medicine, nursing, law and teaching, met with social workers to bring to bear all the force of experience and judgment, humanity and compassion on adoption practice. This interdisciplinary approach has long characterized the work of the Child Welfare League and will continue.

We share with Mrs. Kampelman her complaint that religion and age are crude measures of a family's capacity for parenthood. As to religion, social agencies must operate within the laws of the state in which they are incorporated. Many agencies are sectarian and as such subscribe to the religious qualification clause. This has placed a special burden on the non-sectarian agency. Contrary to the writer's assertion that social workers have shown no leadership here, the Child Welfare League held a special workshop on this subject, and continues to work with religious leaders and lawyers toward a resolution of this problem. It is also true that where possible children are placed with those who have intermarried and have agreed upon a single religious faith in which to rear a child if that family seems best able to give a warm family life to the child in question.

As to age, nature herself has devised the span of childbearing, and in America the largest number of mothers giving birth to a first child is found in the age group 20 to 24. For the age group 30 to 34, the number is one-seventh as large, and for the age group 40 to 44 the number drops to one birth per thousand mothers.* As we pointed out in our article, rigid rules as to age lead to injustice, and the only satisfactory

*1 VITAL STATISTICS, U. S. Department of Health, Education, and Welfare, Part 1, XXXVI.

approach would be a case by case consideration of each family applying. With new knowledge in the field of fertility, however, families are applying much earlier, and young babies are not frequently placed with families in which the mother is within the closing phase of child-bearing years.

It is only with the co-operation of all who are interested in adoption, whether critical or approving of present practices, that we can achieve an orderly adoption process administered with wisdom and compassion.

MIRIAM ELSON
ALEX ELSON

Chicago, Illinois

### *More on Mr. Wyman and Dean Griswold*

▪ In your September, 1955, issue, Austin L. Wyman challenges views advanced in Dean Erwin N. Griswold's notable discussion regarding professors who invoke the Fifth Amendment. The purpose of this letter by one who has been a member of the Bar for over half a century is not to enter the debate but only to call attention to two far-reaching proposals by Mr. Wyman and to inquire whether they deserve support by the Bar.

Mr. Wyman declares that "we need not have martial law proclaimed before we can believe that the nation's danger from Communism is sufficiently great to justify putting the national welfare before many of our prized liberties". Hence he urges that "our institutions of learning adopt the uniform rule that . . . faculty members claiming Fifth Amendment protection on questions dealing with Communist activity shall be required to give up their posts".

Would Mr. Wyman, in relieving our universities of the duty, also strip them of the power to pass on each case in the light of all the facts; of the right and responsibility, unmoved by clamor or hysteria, to hire and fire on the basis of informed judgment? Does Mr. Wyman contemplate legislation to force his uniform rule upon our educational institutions?

No one shall be deprived of life, liberty or property without due process of law. So say the Fifth and Fourteenth Amendments. Would Mr. Wyman's formula violate due process by denying to the university the right to grant a fair hearing to its teachers?

Let us turn to Mr. Wyman's proposal to put "national welfare before many of our prized liberties". Is the menace of Communist traitors within our borders such that we should now proclaim to the world that the time has come for us to whittle away those liberties? "God knows", says Judge Learned Hand, "there is risk in refusing to act till the facts are all in; but is there not greater risk in abandoning the conditions of all rational inquiry?"

Urging our nation to strengthen its "dedication and devotion to the precepts of our founding documents" President Eisenhower's Inaugural Address declared that "we who are free must proclaim anew our faith. This faith is the abiding creed of our Fathers." That creed was embodied 165 years ago in the Bill of Rights. Shall we abandon it now?

These, the writer suggests, are timely questions for the Bar of our country to ponder.

JAMES N. ROSENBERG

New York, New York

*(Continued on page 582)*

# The Fifth Amendment:

# Yesterday, Today and Tomorrow

by **R. Carter Pittman** • *of the Georgia Bar (Dalton)*

▪ **In a most challenging piece of research, Mr. Pittman points out why the privilege against self-incrimination was by the Founding Fathers specifically limited to "criminal" cases, and that the extension of the privilege by the Supreme Court to civil cases, and latterly to congressional hearings, is historically without constitutional warrant. He points out that Congress, following the practice of Parliament which has never recognized the privilege in legislative investigations, can, as in the Immunity Act of 1954, deny the exercise of the privilege by an appropriate immunity statute proscribing the use, in both the federal and state courts, of incriminating evidence obtained in congressional hearings.**

▪ When a constitutional provision, designed to preserve liberty, is redefined to serve another or different purpose, we are put on notice that it may be redefined again to serve still another and that a guardian of liberty may become its pallbearer.

The privilege against self-incrimination is such a provision. As stated in the Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself".

In numerous decisions, beginning with *Counselman* v. *Hitchcock*[1] and coming down through *Quinn* v. *United States*,[2] *Emspak* v. *United States*,[3] and *Bart* v. *United States*,[4] the Supreme Court has extended the privilege until the words "in any criminal case" have been completely and effectively deleted from the privilege.

The latest extension of the privilege is, in its broadest application, to congressional investigations which everyone must know and concede are not and cannot fall within the meaning of the Fifth Amendment privilege unless the words "in any criminal case" are completely ignored.

In *Quinn* v. *United States*[5] one of the dissenting judges expressed his wholehearted assent to the judicial amendment of the self-incrimination clause by striking the words "in any criminal case" therefrom, but he protested against the new rule laid down by the Court in that case, under which a contumacious witness must now be given a formula for claiming the privilege and after refusal to answer must be pleaded with a second time in order to get his "intent" not to answer set up. Justice Harlan, being new and uninitiated, couldn't approve the "new rule". He said:

> This sympathetic attitude toward the clause should not lead us to intrude our ideas of propriety into the conduct of congressional hearings. The rule laid down by the Court today merely adds another means for interference and delay in investigations and trials, without adding to the protection of the constitutional right of freedom from self-incrimination.

"Interference"? "Effrontery" is a better word!

Chief Judge Magruder of the First Circuit Court, in the case of *Maffie* v. *United States*,[6] wisely observed:

> Our forefathers, when they wrote this provision [meaning the privilege against self-incrimination] into the 5th Amendment of the Constitution, had in mind a lot of history which has been largely forgotten today.

That truth is a challenge to the writer now as was the same truth more than twenty-five years ago when he prepared for publication an article which attempts to tell some of that "forgotten history"[7].

1. 142 U.S. 547 (1891).
2. 349 U.S. 155 (1954).
3. 349 U.S. 190 (1954).
4. 349 U.S. 219 (1954).
5. *Supra*, pages 184-185.
6. 209 F. 2d 225, 227.
7. In May, 1935, the VIRGINIA LAW REVIEW (Vol. 21, page 763) published *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, by the writer. During the twenty intervening years, that article has been used and cited and misused and not cited many times.

See, for example, WIGMORE ON EVIDENCE, (3d Edition) §2250, page 303: *Problems of the Fifth Amendment*, by C. Dickerman Williams, 24 FORDHAM LAW REVIEW 21 (1955) (a valuable article); 28 TULANE LAW REVIEW 13 (speech by Herbert Brownell, Jr.) Compare: THE FIFTH AMENDMENT TODAY, by Erwin N. Griswold. The first sentence of Mr. Griswold's book is: "The material in this little book is not presented as a scholarly essay." The book does not make clear what the material in it was presented as. However, it appears to impress the Supreme Court, if one judges by its frequent citation in recent cases.

In 1935, the writer said:[8]

> This privilege against self-incrimination came up through our colonial history as a privilege against physical compulsion and against the moral compulsion that an oath to a revengeful God commands of a pious soul. It was insisted upon as a defensive weapon of society and society's patriots against laws and proceedings that did not have the sanction of public opinion. In all the cases that have made the formative history of this privilege and have lent to it its color, all that the accused asked for was a fair trial before a fair and impartial jury of his peers, to whom he should not be forced by the state or sovereignty to confess his guilt of the fact charged. Once before a jury, the person accused needed not to concern himself with the inferences that the jury might draw from his silence, as the jurors themselves were only too eager to render verdicts of not guilty in the cases alluded to.

During the intervening years nothing has occurred to alter that opinion. It is still true that those who claim the privilege against self-incrimination are guilty of that about which they refuse to testify. That is the only respectable reason for claiming it. We have forgotten that the privilege matured as a handmaiden of the jury system which is the distinguishing feature of Anglo-Saxon jurisprudence. Like the jury system, and like the presumption of innocence, it was designed to shield patriots from arbitary power—not criminals from all power. The Jeffries and Scroggs of history have helped to mature it. So have jurors such as those who served in *Rex* v. *Penn and Mead*[9] who suffered judicial torture rather than assent to a guilty verdict.[10]

Many questions have arisen with respect to the privilege against self-incrimination that remain unanswered. A question, with late emphasis, is why were the words "in any criminal case" inserted into the Fifth Amendment? Do they have meaning, and if they do what is that meaning?

## George Mason . . . *Author of the Phrase*

The privilege as first phrased by George Mason for Virginia's Declaration of Rights, in May, 1776, was:

> That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation . . . nor can he be compelled to give evidence against himself. . . .

As we have noticed, the express language of the Fifth Amendment relieves one from testimonial compulsion only in a "criminal case". The privilege as stated by Mason applied not only to criminal cases, but it applied to "all capital or criminal prosecutions".

The word "prosecutions", as used by Mason, seems to mean following up, through the instrumentalities of governments, of a person accused of a public offense, with the steady and ultimate purpose of reaching a determination of the guilt or innocence of the accused. The word "case", as used in the Fifth Amendment, has a more narrow meaning. A "case" may result from a "prosecution" that matures into a "case" at that point where it first takes such form that the judicial power is capable of acting upon it.

Why did Mason use the phrase: "capital or criminal prosecutions"? Was it possible for "capital prosecutions" to be carried on that were not at the same time "criminal prosecutions"? English history affords examples of "capital prosecutions" that were not "criminal prosecutions". An attainder, forbidden in the body of the United States Constitution, might be a "capital prosecution", and not necessarily a "criminal prosecution". Neither George Mason's Virginia Declaration of Rights of June, 1776, nor his Virginia Constitution, adopted on July 5, 1776, prohibited bills of attainder or the passage of *ex post facto* laws. Mason regarded bills of attainder as necessary at times. On September 8, 1787, in the Constitutional Convention in Philadelphia, Mason pointed out that "As bills of attainder which have saved the British Constitution are forbidden, it is more necessary to extend the power of impeachments", and on his motion at that time the congressional power of impeachment was liberalized in order that the representatives of the people might prevent "attempts to subvert the Constitution (which) may not be treason as above defined."

It is understandable that Mason should have extended the Virginia privilege against self-incrimination to legislative "prosecutions" in the nature of attainders such as found sanction in England and in most of the colonies at that time. While Mason was not a lawyer by profession, he was certainly the best constitutional lawyer in Virginia. The Virginia House of Burgesses and later the House of Delegates habitually dragged him out of retirement to "state the case" for Virginia both as colony and as commonwealth. A constitutionalist must know history. He knew it.

A short time before Mason prepared the Virginia Declaration of Rights, Governor Dunmore of Virginia, who, with his Council, exercised judicial, executive and legislative powers in various degrees, had sent out to distant counties for persons suspected of forging paper currency and had them brought before him and his council in Williamsburg where he set up a new model Star Chamber and examined the suspects with undue severity, seeking to make them incriminate themselves. Since forging paper currency in Virginia was then a capital crime, Governor Dunmore was seeking to make them hang themselves. There was no law or precedent justifying such conduct. The House of Burgesses protested violently by special resolution setting forth that the Governor's proceeding was:[11]

> different from the usual mode, it being regular that an examining court on criminals be held, either in the county where the fact was committed, or the arrest made.

The resolution then proceeded:

> The duty we owe our constituents obliges us to be as attentive to the safety of the innocent as we are de-

8. 21 Virginia Law Review 783.
9. 6 How. St. Tr. 951.
10. For the history before 1776 see Wigmore on Evidence, (3d Edition) §2250; 21 Virginia Law Review 763.
11. Journal of the House of Burgesses (1773-1776) page 22.

sirous of punishing the guilty; and we apprehend that a doubtful construction and various execution of criminal law does greatly endanger the safety of innocent men.

The action of Governor Dunmore was not in a "criminal case". Whether the conduct of Dunmore was in the "usual mode" or was "different from the usual mode", it was a part of a "capital or criminal prosecution". Thus the privilege against self-incrimination, as framed by George Mason, covered all prosecutions, whether judicial, legislative, or executive so long as those prosecutions were either "capital or criminal". But when the privilege went into the Fifth Amendment it was so narrowed down that it could only be constitutionally asserted in a "criminal case". Why? That question may be solved if we can but uncover the "forgotten history".

In order to better understand the evolution of the privilege from May, 1776, until it was adopted as a part of the Fifth Amendment on December 15, 1791, it may not be inappropriate or unprofitable to follow it chronologically and step by step.

The Virginia Declaration of Rights, originally written by George Mason in May, 1776, and proposed by the Report of the Official Committee on June 1, 1776, contained eighteen paragraphs. The official draft adopted on June 12 contained sixteen paragraphs. The Committee draft was published in the *Virginia Gazette* of June 1.

The first unnumbered paragraph appearing in the *Virginia Gazette* was as follows:

> A Declaration of Rights made by the Representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to us and our posterity, as the basis and foundation of government.

As it appeared in the Pennsylvania newspapers of June 6, 8 and 12 and in the *Maryland Gazette* of June 13, the Committee draft appeared not as in the *Virginia Gazette* but was preceded by the following paragraph:

> The following declaration was reported to the Convention by the committee appointed to prepare the same, and referred to the consideration of a committee of the whole convention; and in the meantime, is ordered to be printed for the perusal of the members.

A bit of "forgotten history" is that the Declaration, as "printed for the perusal of the members", was sent to newspapers throughout America and from thence to the four corners of the earth.

The first line of the first paragraph of the Committee draft, so widely copied in America and France, was: "That all men are born equally free and independent."

The first line of the first paragraph, as revised in the official draft, was: "That all men are by nature equally free and independent."

The official draft was virtually unknown beyond the limits of Virginia for fifty years after its adoption. The Committee draft was the one copied elsewhere. It was the one translated into French and published in France by Franklin first in 1778 and in several editions thereafter. The official draft was never published in a bound book with other American Constitutions until it appeared in an obscure Winchester, Virginia, edition in 1811. No change was made in the statement of the privilege against self-incrimination by the Convention.

## The Pennsylvania Version . . . *A Copy of Its Virginia Model*

The Pennsylvania Convention that met on the fifteenth day of July, 1776, adopted a declaration of rights and, as stated in the *Diary* of John Adams for June 23, 1779, Pennsylvania copied the Virginia Declaration of Rights "made by Mr. Mason . . . almost verbatim".[12] Her first line was: "That all men are born equally free and independent."

The privilege against self-incrimination, as adopted by Pennsylvania in September, 1776, appeared in paragraph 9 as follows:

> That in all prosecutions for criminal offenses, a man hath a right to be heard by himself and his council . . . nor can he be compelled to give evidence against himself . . . .

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Maryland came next and put it this way in paragraph 20:

> That no man ought to be compelled to give evidence against himself, in a court of common law, or in any other court, but in such cases as have been usually practiced in this state, or may hereafter be directed by the legislature.

Delaware followed, stating the privilege in paragraph 15 of her Bill of Rights like this:

> That no man in the courts of common law ought to be compelled to give evidence against himself.

12. Adams recorded in his diary that the Virginia Declaration of Rights was published in the newspapers while he, Jefferson and Franklin were a committee trying to write the Declaration of Independence in Philadelphia. He failed to admit or deny that they used the first three paragraphs to make a preamble for their Declaration. Jefferson carefully and repeatedly declined to deny it. All he would ever say was that "I turned to neither book nor pamphlet while writing it." That was true—so Locke, Otis and Paine were excluded. But what about *newspapers* and *circulars*? Adams knew exactly what he was talking about as he made the forgotten entry in his diary.

North Carolina came next in December, 1776. In Section 11 it was stated:

> That in all criminal prosecutions every man hath a right to be informed of the accusation against him, . . . and shall not be compelled to give evidence against himself.

Although Vermont was not a state abroad she acted the part at home and adopted a Declaration of Rights in 1777. The privilege appears in her paragraph 10 like this:

> That in all prosecutions for criminal offenses, a man hath a right to be heard by himself and his council . . . nor can he be compelled to give evidence against himself. . . .

A few weeks after John Adams made the tell-tale entry in his *Diary*, mentioned above, while aboard the ship *Le Sensible*, en route from France to America, he was named on a committee to write a Declaration of Rights for Massachusetts. He could do no better than others had done. By that time it was like picking the same old tune at a "hoe-down". He, too, copied the Virginia Declaration of Rights "almost verbatim". The privilege against self-incrimination was re-stated in his paragraph 12 as follows: "No subject shall be . . . compelled to accuse or furnish evidence against himself."

The Adams restatement of the Mason original next found its way into the Declaration of Rights of New Hampshire in June, 1784, as follows: "No subject shall be . . . compelled to accuse or furnish evidence against himself."

John Adams broadened the privilege so as to make it applicable to the *person*, or "subject", wherever he might be. Mason's statement related the privilege to any proceeding that formed a part of *prosecutions*.

## The Bill of Rights . . . *The Constitutional Convention*

For reasons that would require more space to fully outline than is allowable, no one suggested the necessity of a Bill of Rights in the Constitutional Convention of 1787 until the afternoon of September 12, near the end of the Convention. Likewise, until the morning of the same day, the words "herein granted" had not appeared in the granting clause of Article I of the Constitution so as to restrict all lawmaking powers to elected representatives, as is an absolute essential to republican government, and so as to specifically restrict the Congress to the legislative powers catalogued in the Constitution itself. That has more significance than meets the eye. George Mason finally induced Gouverneur Morris of the Committee of Style to insert the words "herein granted" into the granting clause by a threat that such was an absolute condition precedent to his approbation. It was passed over *unnoticed* by the Committee of the Whole on the morning of September 12, 1787. At last Mason breathed a sigh of temporary relief.

Once the limitation on legislative power became fixed in the bedrock of the Constitution, Mason decided that it was time to strike for a bill of rights. He and Elbridge Gerry had planned it that way. He introduced the subject in a most disarming way, during a discussion opened by Gerry, a brilliant delegate from Massachusetts, while urging "the necessity of juries to guard against corrupt Judges". Mr. Gorham, of Massachusetts, alluded to equity cases in which juries are not used, and then, according to *Madison's Notes* of September 12, the following occurred:

> COL. MASON perceived the difficulty mentioned by Mr. Gorham. The jury cases cannot be specified. A general principle laid down, on this and some other points, would be sufficient. He wished the plan had been prefaced with a bill of rights, and would second a motion, if made for the purpose. It would give great quiet to the people, and, with the aid of the state declarations, a bill might be prepared in a few hours.
> MR. GERRY concurred in the idea, and moved for a committee to prepare a bill of rights.
> COL. MASON seconded the motion.

As is well known, the minions of consolidated power were "put out" with the two reactionary conservatives who brazenly urged the rights of men over power. They were promptly "put in their places" by a unanimous vote of the states against the motion—*Madison's Notes*, changed in old age to show a tie, to the contrary notwithstanding.

When Mason said: ". . . with the aid of the state declarations, a bill might be prepared in a few hours", he furnished the key to a secret and a bit of forgotten history that has never been revealed at any other place or time.

As is well known, the Constitutional Convention adjourned five days after George Mason's motion for a bill of rights was defeated by the unanimous vote of the states in convention. Mason's aging mind was aflame. As others were preparing to leave Philadelphia, he paused to write his *Objections* to the Constitution that was to be read on every frontier and in every hovel of America. His first six words were: "There is no declaration of rights"!

In a letter to Thomas Jefferson dated October 24, 1787, Madison pictured history's grand champion of human liberty and dignity at the last scene in Philadelphia:

> Col. Mason left Philada. in an exceeding ill humor indeed. A number of little circumstances arising in part from the impatience which prevailed towards the close of the business, conspired to whet his acrimony. He returned to Virginia with a fixed disposition to prevent the adoption of the plan if possible. He considers the want of a Bill of Rights as a fatal objection.

Either prior to September 12, 1787, in Philadelphia, or at Gunston Hall, or in Richmond, prior to June 9, 1788, Mason devoted a "few hours" to the preparation of a Bill of Rights "with the aid of the state declarations", as he had suggested in Philadelphia. His principal "aid" was his Virginia Declaration of 1776. Maryland and Pennsylvania contributed a little.

Prior to June, 1788, eight states had ratified the Constitution, but none had proposed a bill of rights. The Richmond Ratifying Convention was under way. Mason and

*(Continued on page 588)*

# Compulsory Arbitration:

# An Experiment in Pennsylvania

by **Aaron S. Swartz, Jr.** • *of the Pennsylvania Bar (Norristown)*

**▪ Justice delayed is justice denied, and nearly every state in the Union is faced with the problem of an increasing burden of litigation that is clogging court calendars and making it virtually impossible to bring suits to trial without months of delay. Mr. Swartz writes of an experiment in Pennsylvania which has proved highly successful. Small claims are referred to a board of lawyer-arbitrators for hearing and decision, with a right of appeal and a trial de novo before a court. The complete details of the plan are discussed below.**

▪ The trial and disposal of civil cases up to one thousand dollars in amount is one of the great problems of the day in the efficient administration of justice. These small cases have clogged the work of the courts, have created backlogs of untried cases, have hampered the work of judges in other and more important matters and have resulted in the practical denial of a trial to the plaintiff in the small case.

Of the sixty-seven counties in the Commonwealth of Pennsylvania, Montgomery County is one of the leaders with a population of approximately 400,000 and a Bar of 215 lawyers. The county has many industries, a large and prosperous agricultural section, and an even larger suburban population since it adjoins the City of Philadelphia. Many arterial highways crisscross the county, resulting in an unusually large amount of automobile traffic, with resulting collisions and damage claims.

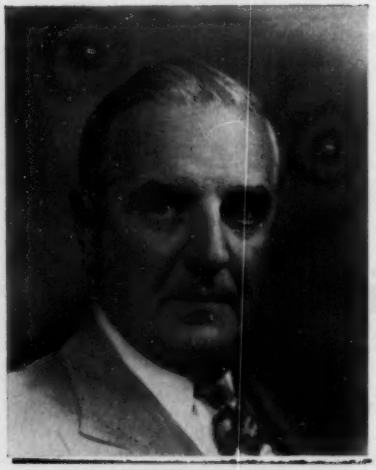
The county has four Judges of the Common Pleas Courts, which are tribunals of first impression without limitation as to amount. Although these judges devote all of the time possible to the trial of civil cases, in May, 1955, there was a forced delay of two years from the filing of a suit until it could be brought to trial. This situation is not unusual in Pennsylvania. Some counties are in better position, some in worse shape.

In answer to this unfortunate situation and for other reasons, the legislature of Pennsylvania enacted the Act of January 14, 1952, P. L. 2087, 5 Purdon's Digest, §30, commonly known as the Compulsory Arbitration Act. This act provides, in brief, that a Court of Common Pleas in any county may by rules of court decree that all civil cases, with some minor exceptions, where the amount in controversy is $1,000 or less shall first be submitted to and heard by a board of three arbitrators, who are members of the Bar of the County.

These arbitrators are selected by the prothonotary (clerk of the court) from the list of lawyers qualified and consenting to act, the names of such arbitrators being taken from the list in alphabetical order, the first named serving as chairman of the board. The board makes its report and renders its award within twenty days after the hearing. The compensation of the arbitrators is determined by the court and paid by the county upon the filing of their report and award. Any party appealing must first repay to the county the fees of the arbitrators thus paid by the county, but such fees are not taxed as costs or recoverable from the adverse party in any proceeding; in other words, they do not follow the award. All appeals are tried *de novo*. The arbitrators are not required to make a record of the proceedings before them, but if any party desires a record, the arbitrators provide a reporter and cause a record to be made and the party requesting it pays the cost.

The constitutionality of this act has been attacked and has been upheld by the Supreme Court of Pennsylvania in the *Smith* case, 381 Pa. 223, 112 A. 2d 625.

In the spring of 1954, the writer was appointed by the Montgomery Bar Association as chairman of a committee to investigate compulsory arbitration with a view to its adoption by the judges of Montgomery Coun-



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ty. The proposition was new to the members of the committee and at first was viewed with considerable doubt.

Accordingly, the committee wrote to every county in the Commonwealth requesting a copy of its rules, if it had adopted compulsory arbitration, and also sent a questionnaire seeking information as to whether the operation of the new procedure had produced favorable or unfavorable results. The committee found as of September, 1954, that thirty-one of the sixty-seven counties in Pennsylvania had adopted compulsory arbitration. All of the thirty-one counties replied to the questionnaire and all reported favorably as to operation, stating that the judges, the lawyers and the litigants agreed that the advantages of the new procedure were many and important, whereas the disadvantages were few and minor. Even the county commissioners, who pay the bill, were strongly in favor of compulsory arbitration, as they found that it resulted in a saving to the county. Jurors' fees, tipstaves and other court fees were reduced. Stenographic costs, which have been quite heavy, are entirely eliminated under the new system.

## The New Procedure . . . *Many Favorable Aspects*

Space will not permit discussion of the many advantages reported by the many counties. However, Chief Justice Horace Stern in the *Smith* case, *supra*, has summarized the favorable aspects of the new procedure in a succint and masterful fashion as follows:

> The Act of 1952, greatly enlarging, as it does, the scope of the Act of 1836, is of extreme importance in that it effects a decided innovation in procedure for the adjudication of the class of minor claims to which it relates. It has many obvious advantages. It is clearly designed to meet the situation which prevails in some communities of jury lists being clogged to a point where trials can be had only after long periods of delay, —a condition resulting largely from the modern influx of negligence cases arising from automobile accidents in a great number of which no serious personal injuries are involved. Removing the smaller claims from the lists not only paves the way for the speedier trial of actions involving larger amounts, but, what is of equal or perhaps even greater importance, makes it possible for the immediate disposition of the smaller claims themselves, thus satisfying the need for prompt relief in such cases. By the same token, and working to the same end, the use of the Act will free courts for the speedier performance of other judicial functions. Moreover, there will be a saving to claimants of both time and expense by reason of greater flexibility in fixing the exact day and hour for hearings before the arbitrators as compared with the more cumbersome and less adaptable arrangements of court calendars. The operation of the Act has proved eminently successful in all respects, it appearing from statistics gathered in 19 of the 31 counties or more which have thus far put the statute into effect that there were 585 cases tried by arbitrators under its provisions in the period from July 1 to December 28, 1954, in only 30 or 5% of which appeals were taken to the courts of common pleas. It would seem clear, therefore, that the system of arbitration set up by this statute offers encouraging prospects for the speedier administration of justice in the Commonwealth.

The committee also determined to get the actual facts and not guess as to the status of the trial list in Montgomery County. The files in the prothonotary's office were pulled down for a period of one and one-half years, and every case was examined. The result was illuminating and surprising. Without going into detail, it was found that 60 per cent of all suits brought were within the $1,000 limit. Under our rules, after a case is at issue counsel can mark the case for a jury trial upon payment of a jury fee of $5.00. We found that 536 cases had been marked for trial and the jury fee had been paid in some cases for well over a year. Applying the 60 per cent proportion, 322 cases could be disposed of by arbitration. These cases were screaming for trial, and removing these cases from the trial list would leave the court free to attack and to reduce the backlog of the more important cases for trial.

We are now enthusiastic about compulsory arbitration and its operation. The judges of Montgomery County have adopted it, effective May 1, 1955, making it applicable to pending cases. The court has promulgated a set of rules which, we believe, combines the best features of the various rules in other counties. We have provided for an arbitration administrator, a lawyer, who will assist the prothonotary in the scheduling of the cases and in the general procedure under the rules.

The fees payable to the arbitrators in the other counties vary from $15.00 to $35.00 per case for each arbitrator. These fees are paid in the first instance by the county. They are not taxed as costs. The unsuccesful litigant may appeal his case and have a jury trial, but he must then repay the arbitrator's fees to the county and cannot recover them, even though he be successful on the appeal. The only real contention in the Supreme Court was that in some cases this provision amounted "to such a substantial restriction upon the right to present his case to a

jury as to constitute a violation of that constitutional right". The Supreme Court over-ruled this argument, stating that the requirement of the payment of a fee for prosecuting an appeal is not in itself a denial of the constitutional right to a jury trial but that the "problem is one of degree rather than of kind". A required payment of $75.00, the amount of the arbitrators' fees in that particular case, might be too high where only $100 was involved in a dispute. Accordingly, the court suggested that the fees might be graded according to the size of the case.

We believe that in our rules we have provided a more flexible solution of this problem. Our rule No. 6 (3) provides: "The Court may, on petition of any party to a case, on cause shown and to prevent injustice or hardship, reduce the amount of this repayment or relieve appellant from such repayment in its entirety".

It may well be, in some cases, where, for instance, a new question of law is involved, that the appellant should not be required to repay any of the arbitrator's fees.

The Supreme Court also recognized a more important consideration on the opposing side, when it stated: "The requirement that the appellant repay to the county the fees of the arbitrators is obviously designed to serve as a brake or deterrent on the taking of frivolous and wholly unjustified appeals; if there were not such a provision the defeated party would be likely to appeal in nearly all instances and the arbitration proceedings would tend to become a mere nullity and waste of time."

## After One Year . . .
### *Expectations Exceeded*

As of May 1, 1956, compulsory arbitration has been in effect in Montgomery County for one year. The favorable results in operation have exceeded our expectations. Hearings were held even during the summer months. Four hundred fifty-eight cases have been set for arbitration and for the most part finally disposed of. This is a very large number of trials for a county of our size.

We are now up to date with arbitration cases. Our backlog has disappeared. Unfortunately this is not true as to the cases involving over $1,000 in spite of the fact that they represent only 40 per cent of the former total trial list.

The real denial of justice before arbitration, at least in our community, was to the plaintiff, be he rich or poor, who had a claim for $150 or less, mostly in car damage cases. As a practical matter he could not get his foot in the courtroom door. When he was told of the delay in getting to trial, continuances of his case, hanging around the court with his witnesses for possibly several days, resulting motions for new trials, etc., he concluded that it was not worth while to bring suit, and his lawyer had to tell him that he was about right.

There is no such delay in arbitration cases, now that we are current. Sixty days is the proven limit from the time suit is brought until final judgment, if no appeal is taken. Only one case is scheduled for an appointed time and place. This is a great advantage to both lawyer and client who do not have to wait around court until their case is reached and then perhaps have it continued. They go to a hearing immediately. The actual hearings consume from one and a half to two and a half hours, about one third to one half of the time required for jury trials.

All hearings have been scheduled in courtrooms, and the arbitrators occupy the Bench. They conduct dignified and thorough trials with the result that the litigants realize that they have had a real trial of their dispute. The rules of evidence are observed, but without too much formality. The arbitrators can eliminate incompetent evidence in their determination, much as in equity cases. The arbitrators render their verdict at the conclusion of the hearing or hold the matter under advisement. They must file their award within twenty days from the hearing.

The lawyers cannot be compelled to serve as arbitrators. The statement has been made that busy lawyers will not consent to act because the compensation is inadequate. To the contrary, out of 160 lawyers in Montgomery County, qualified to act, all but *one* consented, and that one had good reasons for refusal. The lawyers rightly feel that they are performing a public duty, and in addition they rather like for a change to view a case from above. Who knows but what we may be training some good judges?

The method for selecting arbitrators is quite democratic. There can be no variation from the alphabetical order. Consequently, a newly admitted member of the Bar sits alongside a veteran trial lawyer.

Personal injury cases do not figure in compulsory arbitration. The amount of damages, as set forth in the complaint, which is the test, always exceeds $1,000. However, in some counties compulsory arbitration has proved so successful, that counsel for plaintiffs in cases of trivial injuries, lay their damages at less than $1,000 in order to qualify for arbitration and get to trial quickly.

The operation of compulsory arbitration has met with the general approval and commendation of the judges, lawyers and litigants. There have been practically no complaints. The arbitrators have scrupulously refrained from any sympathy or prejudice as between the parties or their lawyers. This fact is well illustrated by the following case, which is "one for the book". The plaintiff was a Jewish truck driver. He ran into an automobile operated by a Catholic priest who had three nuns as passengers. No one was injured. The award was in favor of the plaintiff for car damages. Plaintiff's counsel was agreeably surprised, because, as he stated, he felt that the facts in the case were close and the three arbitrators were Messrs. McGonigal, McGrory and McTighe. The decisions of the arbitrators have been

more favorably received than the former verdicts of juries.

Compulsory arbitration may not work effectively in large municipalities where there are thousands of lawyers, although I believe this is a debatable proposition. It has not been tried in the large Pennsylvania cities, since Philadelphia and Pittsburgh have their separate courts for minor cases.

At any rate, we are convinced that compulsory arbitration has worked a wonderful improvement for Montgomery County in the administration of justice in general and in the trial of civil cases in particular.

# News from the Cromwell Library

■ In April the Cromwell Library published the first issue of its Recent Acquisitions List. The list describes forty-eight publications of bar associations and other professional legal organizations which were added to the Cromwell Library's collection during the preceding month. Edited for the purpose of giving a regular source of information on publications either about the legal profession or produced by the organized legal profession, the list has been distributed to 250 law libraries and bar associations as a service of the Cromwell Library. There are other book lists which cover codes, reports and legal texts, but no such collected information has heretofore been regularly available about the publications of the legal profession itself.

Further evidencing its interest in the publications of the organized Bar, the Cromwell Library has just recently issued the first number in the American Bar Foundation's Microcard Series. This set of sixteen microcards reproduces all issues of the *Illinois State Bar Association Quarterly Bulletin*, the predecessor of the current *Illinois Bar Journal*. It was published from 1912 to 1932. It is now out of print. Since the Cromwell Library wanted to have this publication in its collection, it secured the permission of the officers of the Illinois State Bar Association to reproduce the *Bulletin* on microcards. The *Bulletin* may now be consulted in the Microreproduction Room at the Cromwell Library.

Other law libraries may not have the *Quarterly Bulletin* available. The Cromwell Library, with the cooperation of the Illinois State Bar Association, is pleased to announce that it will sell copies of the microcard edition of the *Illinois State Bar Association Quarterly Bulletin* to interested law libraries at cost. Other out-of-print bar publications will be republished in the American Bar Foundation's Microcard Series in the near future.

The interest of the Foundation and the Cromwell Library in professional publications is not restricted to the United States. Co-ordinating its efforts with the work of the American Bar Association's Special Committee on Co-operation with the Legal Profession of Friendly Free Nations, the American Judicature Society's interest in the visits of foreign lawyers and judges and the worldwide distribution of the AMERICAN BAR ASSOCIATION JOURNAL, the Cromwell Library has written all the professional organizations which are members of the International Bar Association and the Inter-American Bar Association, asking if they would be interested in exchanging their own publications for those of the American Bar Association and other American professional groups which may be made available to the Cromwell Library for this purpose. The library's collection of bar publications is quite specialized, and this exchange program is part of the plan to make its geographical coverage as wide and all-inclusive as possible.

A two-page description of the various research projects and library activities currently in progress at the American Bar Foundation was distributed to the officers, delegates and observers in attendance at the Ninth Conference of the Inter-American Bar Association in Dallas the latter part of April. This descriptive announcement was distributed in both English and Spanish.

This is a reminder to members of the American Bar Association and to state and local bar associations. The Cromwell Library is operated as a service facility for your benefit. You are welcome to use its reading room and the collection. As of March 31, 1956, the library had over 6,000 catalogued books, periodicals and pamphlets. It is currently receiving 156 titles published by the American and local and state bar associations. While the library staff may not, under the present regulations of the Board of Directors, offer you a briefing service, it will do ready-reference work such as the preparation of short bibliographies on a subject in which you are interested. The library has an up-to-date

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**American Bar Foundation Publications available on order from: Cromwell Library American Bar Foundation 1155 East 60th Street Chicago 37, Illinois**

Illinois State Bar Association Quarterly Bulletin. 1912-1932. Microcard Edition. American Bar Foundation Microcard Series No. 1. 16 cards. $4.00 plus postage.

Cromwell Library. Recent Acquisitions. Vol. 1, No. 1, April, 1956. Apply.

Publication No. 1. List of Unpublished Legal Theses in American Law Schools; List of Current Legal Research Projects in American Law Schools. May, 1954. 142 pages. $1.50.

Supplement A to Publication No. 1. List of theses and research projects for the academic year 1953-54. Oct., 1954. 21 pages. $.50.

Supplement B to Publication No. 1. List of theses and research projects for the academic year 1954-55. Oct., 1955. 59 pages. $1.00.

# The Torch of Liberty:

# The Promise of the New World

by E. Smythe Gambrell · *President of the American Bar Association*

**■ Addressing the assembled lawyers from all parts of the western hemisphere during the Ninth Conference of the Inter-American Bar Association, in Dallas, Texas, April 20, President Gambrell spoke stirringly of the common tradition of liberty under law which is cherished by all the peoples of the Americas.**

■ May I express my warm thanks for the gracious hospitality you have accorded me here. I bring you the greetings of the American Bar Association and the legal profession of this country.

This is truly an inspiring meeting. This great audience; the eminence of those who are around us; the resonant voice of professional brotherhood; the deep respect for law which inevitably accompanies the progress of those who love freedom and their fellow man; the unifying, harmonizing note which the law thus adds to our common aspirations and the kinship of our history; all that kind and rank of ideas are racing through the mind on such an occasion as this. Whether in common law or civil law, and in whatever land, we serve as one great priesthood the common cause of justice. Ours is the happy privilege of calling men everywhere to worship at the shrine of liberty under law.

It is fitting and proper for the great brotherhood of law in this vast hemisphere to gather this week in this gracious city, in a state of great traditions. I know of no plainer call than a common loyalty to law and its appeal to reason. The world wants law. What is law? Law is the spirit of fairness and justice. It is the antithesis of greed and force. Law is the spirit of freedom—freedom according to law. It is the antithesis of autocracy and tyranny. Law is our common heritage, our common pride. We know and feel that in addition to the profound sympathies which we draw from community of history and outlook, there is the common bond of practice and of pride in the same learned, stimulating and exhilarating profession. We at this meeting are living exhibits of the solidarity of the legal profession in the New World.

Someone has said that the things which we have in common are greater than the things which sometimes divide us. I think it would be more real to say that the things we have in common are those which *do* divide us—which give us each the right and power to move on independently, though in accord.

Nothing, I venture to suggest to you, is more truly calculated to keep alive and foster friendship between us than the common love of freedom and the devotion in common to those great principles of impartial justice which are the foundation—the sure foundation—of the common law and civil law. Democracy, self-government, liberty under law—these are still the passion of the people of this New World. Property we ardently desire, but freedom we will have; and faith in the constitutional structures under which that freedom has been enjoyed is the deepest force in our national existences.

With our imperishable heritage of civic ideals held in common for our separate advantage, it is indeed natural and right that we of the Americas should be generous in our praise of each other's achievements, kindly in our sympathy for each other's misfortunes, and true in our support of each other's rightful ambitions. For we must know that upon our common progress, upon the realization of our individual and just purposes, depend the peace and harmony of this hemisphere and to a large extent the welfare of mankind.

We are gathered from the length and breadth of two great continents, from the distant shores of Hudson Bay to the farthest reaches of Cape Horn. Our homelands stretch from

pole to pole and cover half a world. Although in climate, in size, and in character, they range the spectrum of the globe, we are met in common purpose and mutual understanding, in quest of a single goal. The formal differences that would divide us are readily to be seen. For many of us, the patterns of life are a rich legacy of the gracious and gentle cultures of Castile, Aragon and Portugal. For others, the manners and morals of the sturdy Anglo-Saxons have set the mold. Our ears may be attuned to the tongues of Iberia or to the language of England. As lawyers, some of us may take as the materials of our craft the work of art that is the Roman law, in its majestic symmetry and consummate order. For others of us, the medium of legal art is the accumulated wisdom of the ages, the record of a thousand years of human experience embodied in the common law. But more meaningful than our differences are the things we share. Beneath the varied surface ripples run deep and steady currents of common purpose. Whatever heritage we prize, whatever tongue we speak, whatever law we practice and uphold, our professional quest is the same—to bring orderliness, regularity and responsibility to our way of life. From the fusing and blending of these complementing cultures with each other, and with the many others that have invigorated the American peoples, has sprung a transforming spirit of brotherhood among men. This rich divergence in detail bids us to lift up our eyes toward the heights, to seek the higher common ground where differences are left behind. We are nearing the fulfillment of a vision, the vision of a great and devoted prophet of freedom, Father Juan Vidalsco, who clearly foresaw the dawn of a New World, of an America "peopled by men of all nations, and forming a single great family of brothers".

Today our countries of the Western Hemisphere stand as beacons to guide aspiring peoples everywhere. In this New World, the fervent love of liberty is in the heart of every man, and the human soul is respected above all else. Here all stand equal before the law and none is above it. Here the long struggle of man to be free has reached its highest pinnacle. Should we fail in our resolve to keep bright the lamp of liberty, we would carry down with us the hopes of the downtrodden peoples of the world.

## A Common Heritage . . . *The Blessings We Enjoy*

The blessings we enjoy are rooted in a common source and form our common heritage. From the beginnings of written history in the New World, our nations have moved together along the paths of destiny. To the bold far-sighted men who sailed in search of strange and unknown lands, this new-found continent was but a single country, bountiful and rich. To Columbus and Cortez, De Soto and Ponce de Leon, Balboa and Pizarro, the continents they explored were not made up of separate nations. Only after the struggling of European crowns for the treasure here abundant were man-made boundaries raised to divide us. Together the lands were settled, and together in the colonies the settlers learned the hard lesson of the tyranny of distant and unresponsive government, and felt a hunger for the power to rule themselves. Whether the challenge of unconquered wilderness brought men already thirsting for freedom, or whether ordinary men who came to the New World were here imbued with a surging spirit of self-reliance, a devotion to liberty more fervent than the world had ever known welled up in these new lands. In the cabildos of the south and in the small colonies to the north, the ideal grew. At last it burst forth, an irrepressible clamor for emancipation and independence. Even as the colonies that were to become the United States rose up to cast off the yoke of English colonialism, to the south the men of Tupac Amaru and of Socorro rebelled against oppression. In the long struggles that followed, our peoples fought in a common cause. It is not coincidence that the great statesman and soldier Francisco Miranda served beside George Washington in the Revolution of the northern colonies. Nor is it surprising that the magnificent Liberator, Simon Bolivar, was a friend of Jefferson, Adams and other leaders in the crusade that made this country free. Names like O'Higgins, Hamilton, San Martin and Madison are written in glory together in the annals of human liberty. The battles at Concord and Carabobo, Brandywine and Boyaca, Yorktown and Ayacucho were fought by patriots who bled and died in a united sacrifice for freedom.

The spirit which animated our forefathers derived from the same wellsprings of thought. The stirring ideas of Locke, Voltaire, Rousseau and Montesquieu all merged to kindle in north and south the unquenchable flame that illuminated the struggle. Their philosophies of freedom and the dignity of man were echoed in the hearts of Americans in every colony. In his writings in pursuit of personal liberty, the great Vidalsco enumerated what he proclaimed to be "those natural rights received from our Creator, the precious rights which we may not alienate. The free enjoyment of these rights", he continued, "is the inestimable heritage which we should leave to posterity". There is the striking parallel to be found in the ringing words of Thomas Jefferson in his Declaration of Independence for the English colonies: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights. . . . " Whether from Spain, Portugal, France, Britain or elsewhere, the authors of our liberty were moved by a single purpose and had a single aim—to secure the God-given rights of mankind.

In this philosophy, the emancipated peoples of America approached the solemn task of structuring a new government to replace

the oppression they had cast off. It was an article of universal agreement in this enterprise that to heed the imperatives of human equality and freedom would require that government rest upon the consent of the governed, that only the voluntary concord of the citizenry could serve as the foundation of order. In each of the score of nations then established, the model of government adopted was the republic: each man was to be given a voice in the selection of those of his fellows who would be entrusted with the authority of the state, and each was to enjoy a share in the making of the laws that would rule him.

## Majority Rule . . . *Restrained by Law*

But it was not enough to erect the institutions of free election and representative law-making. In their wisdom, the far-seeing men who built our constitutional democracy recognized that majority rule alone cannot safeguard the integrity of the individual. A democratic majority, left unrestrained, could prove as ruthless and tyrannical as the earlier absolutist regimes. Seeing this clearly and fearing it, the statesmen enshrined in organic law, beyond the reach of simple majorities, the personal liberties of all men, whether they be aligned with the dominant forces of the community or whether they stand in lone dissent. The people thus permanently denied to government the power to interfere with rights and freedoms proclaimed to be inalienable. In the structures of our institutions of government, we put our faith in the ability of a man to decide what is good for himself. But we reposed less faith in his ability to decide what is good for others. We were skeptical of the wisdom of a transient and temporary majority, and we were suspicious of those who claimed the prescience to divine the common good and to lay down the patterns to which all thought and all activity must conform to achieve that good. It was recognized that the capacities, drives, wants and needs of the human being are beyond the powers of any man or group of men to comprehend and encompass at any single time, and that only experience can furnish reliable guides. Our constitutions therefore guaranteed to the individual the right to experiment, to be different, to disagree, to choose an untried path which the rest of us might regard as sheerest folly. By limiting the powers of government in the interest of individual freedom, we have sacrificed a measure of governmental efficiency. But the sacrifice is offered to achieve what we are proud to believe is a higher good. In declaring the rights of man in our written constitutions, we sought to preserve to each the freedom to grow, to employ his God-given powers as he, in the teaching of his conscience, believed best. Our concern rose above the creation of a favorable material environment where man can dwell in comfort. It is for us the supreme function of government to keep clear the ways for the enlargement of human personality, for the realization of the man's inherent dignity, and for the development of individual integrity.

The other stone in the foundation of our governmental structures that serves as the firm base for human freedom is the familiar principle that the concentration of power in any single man or group of men entails the risk of autocracy. The pages of history teach, above all else, the dangers of absolute power in the hands of any human, no matter how good his intentions or how pure his motives. To avoid these risks, and to dissipate the corrupting force of unchecked power, the builders of our way of life dispersed the authority of government among its several functional divisions, each to serve as a control upon the others. In its usual formulation, this fundamental of government is known as the doctrine of the separation of powers.

As the history of the art of government runs, the principle is old. We find glimpses of it in Aristotle's *Politics*, as he recognizes the three elements of political control—the deliberative, the magisterial and the judicative. But he did not pursue the implications of his classification, nor did he perceive, apparently, the possibility of allocating these three powers to different hands, and of using their reciprocal balances to guard against authoritarian abuse.

Centuries later, when Greek and Roman principles of ordered liberty were rediscovered and restored, John Locke, a leading philosopher of the American Revolution, resurrected the tri-partite division of sovereign power and conceived of the separation as a device for securing individual liberty. But it remained for the great political thinker, Montesquieu, to bring the doctrine to full fruition, and it is he who bears the title of its oracle.

In the turmoil and strife that marked the birth of our respective nations, the hard lessons of autocracy were well remembered. A principle offering promise of an enduring freedom for the individual and a means for containing the centripetal forces of power found ready acceptance. The teachings of Montesquieu, already familiar to the Founding Fathers, were put to the test of practical application. The constitutions of all our American republics reflect the impact of this ideal. In all, the normative principle of government organization, and the first principle of the social compact, is the separation of powers among three co-ordinate and equal branches. As a tenet embedded in a constitutional structure, the doctrine of separation was a unique contribution in man's striving to rule himself, the distinctive genius of government in the Western Hemisphere. The common plan, by dividing the three grand branches of political authority and by allocating to each a checkrein over the others, left no power unrestrained. This is, for us, the essence of the rule of law.

As the eternal order of heavenly spheres is the resultant of the gravitational forces the stars exert upon each other, so in our constitutional scheme we have sought to bring or-

der to the lives of men and the affairs of government through the interacting forces of distinct centers of authority. Knowing that power feeds upon itself, we have set power against power as the pattern of our system. We have learned through experience that in the long run we are better advised to commit matters of government to a pattern of procedural order than to put our faith in the untrammeled discretion of some man or group of men, however wise or altruistic. Without a controlling pattern and a limiting process, our noble declarations of human rights and our great guarantees of individual freedom would be as castles built upon sand.

We of the Americas take pride in the belief that we are governed by the rule of law. We contrast our system with those we call totalitarian, where people are subjected to the whim and caprice of absolute powers. In speaking of a government of laws and not of men, we do not mean that law is self-operating and immune from mortal influence. What we do mean is that the processes of law are obeyed, that those who wield temporal power for the time being are themselves governed by law, that our law-makers are controlled by a discipline that subordinates personal ideologies. It is simply government by principle and process, rather than by people.

## The Ideal of Freedom . . . *Transmuted into Actuality*

An enduring truth that made itself felt in the upheaval that marked our national beginnings was the maxim that the principal custodian of liberty is the judiciary. In any land and at any time, the human rights that can be said to exist are those that the courts stand ready to enforce. Through the work of the judges, life is breathed into the language of a constitution; through their judgments and decrees the ideals of freedom are transmuted into actuality. It followed inexorably that the peoples of America, in their fervent love of freedom, should establish by almost universal consent the principle that a court should regard as void an unconstitutional law, and that the institution of judicial review should be enshrined in our constitutional jurisprudence. More than a decade before the doctrine was to be pronounced by the Supreme Court of the United States, the far-seeing Francisco Miranda had drawn up his plan of government recognizing the essential power of the judiciary to nullify unconstitutional laws. In the northern continent, Alexander Hamilton, writing in *The Federalist Papers,* reviewed the guarantees of personal freedom of the United States and gave voice to the same sentiment when he added: "Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this", Hamilton continues, "all the reservations of particular rights or privileges would amount to nothing".

It is an awesome power that we have thus conferred upon our judges; it is a solemn responsibility that they must discharge. Freedom of the mind and of the conscience, freedom to labor as we choose and to seek our own destinies, all these depend wholly upon a judiciary free from influence. The courts are at once the conservators and the beneficiaries of the doctrine of the separation of powers. It is through the courts that the other branches are compelled to respect their appointed limits, but it is only if the independence of the judiciary is zealously maintained that its essential function can be fulfilled. In common accord, our fathers therefore set about to preserve the integrity of the judicial branch free from encroachment by the others. They collectively have given these honored members of our profession security of tenure in office and security of compensation. The selection of judges has in large part been withdrawn from the arenas of partisan politics. The most consistent article of faith of the great Liberator was his steadfast adherence to the principle of an independent judiciary. Speaking of his draft of the Bolivian constitution, Bolivar expressed his conviction in these words: "The judicial power that I propose enjoys absolute independence; in no other plan of government is so much given it. . . . If the judicial power did not emanate from [an independent] origin, it would be impossible for it to be, in its fullest sense, the safeguard of individual rights. These rights . . . are the ones that insure liberty, equality, and security—all the guarantees of the social order. The real foundation of liberty is in the civil and criminal codes. The most terrible tyranny may be exercised by the courts, through the powerful instrument of the laws. Ordinarily, the executive is no more than the custodian of public affairs; the courts are the arbiters of personal affairs, the rights of individuals. The judicial power is the measure of the welfare of the citizens; if there is liberty, if there is justice, they are made effective by this power."

These are the sources of our common heritage in the principles of liberty, the bright threads in the tapestry of our government of law, the warp and woof of the way of life we share. We have gathered tonight in the fraternity of our mutual traditions to enjoy the conviviality and good fellowship of professional brothers. In other sessions here this week, we have been concerned more directly with our professional endeavors. Recognizing the obligation of lawyers everywhere to work toward a more perfect administration of justice, we have compared ideas for solution of the problems that beset us all, and have considered means for eliminating or minimizing the differences in law that impede free and friendly relations among nations. If lasting peace and understanding are ever to come to this earth, I believe they will result not from the formal functioning of the diplomatic corps nor from

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# Military Law:

# Return to Drumhead Justice?

by **William F. Walsh** · *of the Texas Bar (Houston)*

▪ **The Uniform Code of Military Justice, which in 1951 replaced the old Articles of War and the Articles for the Government of the Navy, has generally been considered the finest system of military justice ever to regulate American military forces. Nevertheless, the Code has been the subject of considerable controversy. Civilians feel that it does not go far enough in eliminating command control of courts martial, while the military, at least in some instances, seem to feel that the Code blunts the edge of military discipline. Mr. Walsh writes to protest some recent proposals for amending the Code originating from the Judge Advocates General of the three Armed Services.**

▪ The Uniform Code of Military Justice, the "Bill of Rights" for America's three million servicemen, is under attack by top military lawyers who have asked Congress to remove some of the basic legal safeguards given military personnel by the Code.

Rear Admiral Ira H. Nunn, Judge Advocate General of the Navy, has described the new measures as "proposals designed to reduce unnecessary burdens imposed upon the Services by the Uniform Code and to increase the powers of officers who exercise command". The "unnecessary burdens" which Admiral Nunn would reduce include the serviceman's rights against self-incrimination, the accused's right to have a full, fair investigation of his case before trial and the right to be tried before an independent judge free from the influences of command.

The Code, passed by Congress almost six years ago, has been the subject of bitter debate since it became effective May 31, 1951. The Act made sweeping changes in military law and established the United States Court of Military Appeals, a civilian "supreme court" for military cases, to which three veterans were appointed as judges.

(Chief Judge Robert E. Quinn, former governor of Rhode Island, was a Navy legal officer during World War II; Judge George W. Latimer, former Justice of the Supreme Court of Utah, was an Army line officer; the late Judge Paul W. Brosman, former Dean of the Tulane University law school, was an Air Force judge advocate.)

In an early opinion, the new court stated that "We believe Congress intended, in so far as reasonably possible, to place military justice on the same plane as civilian justice and to free those accused by the military from certain vices which infested the old system."

It is this philosophy which is under attack today.

Many military commanders have been restive under the Code since it was enacted. The first determined public attempt to do away with the basic provisions of the law appeared, however, in the 1954 annual report to Congress from the Court of Military Appeals and the Judge Advocates General of the Armed Forces.

Last year's report highlighted deepseated differences between the military lawyers, who claim the Code will not work in wartime, and the court members, who consider the new proposals "unnecessarily hostile to the purposes and intent of the Uniform Code". Both sides suggested that the House and Senate Armed Services Committees hold hearings on the new measures.

The heart of the problem lies in the need for swift and sure punishment to maintain discipline in the fighting forces, balanced against justice for the men concerned. The two viewpoints are not mutually exclusive: "Good justice has never had a bad effect on discipline", in the words of Professor James Snedeker, Brig. Gen., U.S.M.C., Ret., former chief of the military law division in the Office of the Judge Advocate General of the Navy.

No one concerned with the prob-

lem thinks that the Code, in its present form, provides all the answers. Two years ago the Court of Military Appeals and the Judge Advocates General agreed on seventeen amendments which would save time and money and increase the informal disciplinary powers of commanders. The Court, in last year's report, again recommended these changes.

### Substantive Revisions . . . *Not Mere Procedural Changes*

The Armed Services went further, however, and insisted on substantive revisions in the Code, rather than mere procedural changes. These new proposals would affect a man accused by the military from the time he becomes a suspect to the time of his last appeal, and would materially reduce his present rights.

Congress is presently holding hearings on legislation which includes many of the desirable amendments to which the Court and the Judge Advocates agreed in 1953. (S. 2133 and H.R. 6583, 84th Congress.) The proposals which the Armed Forces sought in 1954 are still important, however, since they show the real desires of those who are administering military justice today.

One of the most important changes asked by the Navy and Air Force deals with the right against self-incrimination. Under the present law, no member of the military establishment, regardless of rank or assignment, may question a suspect "without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial."

The Navy and Air Force want this restriction to apply only to persons who serve with a "military law enforcement or military crime detection agency" or who are otherwise conducting "an official military investigation".

In civilian life there would be nothing unusual in requiring that only policemen advise suspects of their rights. The soldier or sailor, however, is often questioned by a commanding officer who can take more serious action against him than any military policeman if he fails to "co-operate". If a company commander or first sergeant may question a man, induce him to answer by hinting at the penalty for disobedience and then use his statement against him, the privilege against self-incrimination might as well be eliminated completely in the military.

The privilege against self-incrimination is not protection for the guilty alone, but also saves the innocent from revealing facts which would be damaging in a case based on circumstantial evidence. An innocent person accused by the military will find little comfort in the fact that the case against him is based on statements to his commander rather than to military police.

A second proposed amendment, to curtail the investigation required before a case can be sent to a general court martial, was conceived by the Army and Navy. The present law provides that "No charge or specification shall be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made." At this investigation, the accused has the right to counsel, the right to cross-examine the witnesses against him, and the right to call witnesses of his own.

The amendment proposed is simple: it would delete the words "thorough and impartial" from the sentence quoted above.

The only credible reason for removing these words is that the Army and Navy do not desire to give the accused a full and fair investigation of his case. That this is the actual reason is shown by a Navy suggestion regarding the identity of the officer who must perform the investigation. Under the law as it now stands, the officer who is to prosecute the case at trial cannot conduct the formal pre-trial investigation. The Navy would change this so that the prosecutor could direct both the investigation and the trial, becoming both district attorney and grand jury.

The right to a thorough, impartial investigation is of vital importance to a soldier who may be stationed in remote places far from his family or from civilian lawyers and who can seldom afford to do his own investigating on an enlisted man's pay. (Of the 606 cases which the Court of Military Appeals had decided with written opinions by the end of 1954, all but forty-five involved enlisted men.)

In addition, preliminary investigations in the service are often conducted by some agency such as the Air Force Office of Special Investigations. The reports of these agencies are classified and are not normally available to the accused or his counsel; the agents themselves are not encouraged to talk to the defense about pending cases. Other military witnesses often sense that official approval is on the side of the prosecution and are afraid to help the defense.

Once formal charges are preferred, however, the case is sent to an officer who has no connection with the case. He holds hearings and calls as witnesses the persons who will testify at the trial. The accused and his counsel have a chance to discover the testimony facing them and to question the witnesses while their memories are fresh.

The effect of allowing the prosecutor to conduct the formal investigation should be considered with the fact that the prosecutor often recommends that charges be drawn in the first place and helps the accuser write the charges. Thus, under the new proposal, the accused would have to satisfy the prosecutor, whose mind is already made up, if he wishes to show his innocence before trial or wants to question some witness under oath.

The Navy, wisely anticipating that some persons might not desire to throw themselves on the prosecutor's mercy, has also suggested that the law make it possible for the accused to waive the whole investigation if

he is suspected of a purely military offense such as desertion or disobedience.

A third service proposal would deprive the military judge of his independence from the court members. Until the Uniform Code became law, the "judge" was a member of the court who joined the "jury" in its closed sessions. He was not required to be a lawyer. Since he instructed the court privately about the law regarding the case, the accused had no way of knowing what the court was being told about the law. This system was the subject of long debate during the congressional hearings which preceded passage of the Uniform Code. Congress finally decided to give the military Law Officer the same powers and status he would have as a civilian judge and required that he be an attorney.

Under the Code, the Law Officer instructs the court on the law during an open session and cannot advise the court members privately. The prosecution and the defense may both argue their views of the law to the Law Officer before he instructs the court. The instructions actually given are recorded by the court reporter for review on appeal. If the court members desire additional instructions, they must open the court so that the proceedings are on the record.

The Army and Navy, however, would return the Law Officer to his former status as a member of the court, where his legal mistakes could be made secretly without causing reversal on appeal.

In connection with this suggestion, Maj. Gen. Eugene M. Caffey, the Army Judge Advocate General, made the following statement:

> Experience has shown that, prior to the enactment of the present Code when the law officer was a member of the court instead of an officer of the court, he was of greater assistance to the other members in explaining the intricacies of the legal problems involved than he is under the present system. Thus, the Code has deprived the accused of a safeguard that he previously enjoyed.

General Caffey does not explain why the Law Officer today is unable to discuss the "intricacies of the legal problems involved" in open court where his words may be recorded. The truth is that hundreds of cases have been reversed under the Uniform Code because of errors in the legal instructions given to the court members.

If the military judges cannot accurately instruct the courts when they know their words will be reviewed on appeal, there is certainly no reason to believe that instructions will magically become more accurate because they are given informally in a secret session of the court. There is less reason to believe that the old procedure was a "safeguard" which was "enjoyed" by any accused.

## Law Officer . . . *A Part-time Assignment*

The real problem is that the law regarding instructions is complicated, in civilian life and in the military. Civilian courts, however, have full-time judges who spend their lives perfecting their knowledge of this technical subject and who have hundreds of years of precedent to guide them. Duty as a Law Officer in the military is usually a part-time assignment and the officers concerned do not have time to become fully familiar with the law involved, particularly with only five years' experience under the Code.

Nothing in the Code prevents the military from making assignments as Law Officer a permanent duty, thereby creating a skilled judiciary. Not one branch of the service has yet seen fit to do so, however, and until that is done the part-time judges will continue to make mistakes.

Most citizens would probably agree that the solution is to improve the caliber of the judges, rather than to amend the law to make competent judges unnecessary.

As a member of the court martial, the Law Officer would lose his independence as a judge and again become only a legally trained member of the jury. Under the old system, the "law member", as he was called, conferred with the court members in closed sessions. He could change his rulings at any time during the trial. Although the court members could not openly overrule the law member on most issues, they could impress him with their viewpoints during a closed session.

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If he later changed his ruling, the accused had no way of knowing the basis for the new decision and could only hope that some senior member of the court had not impressed the law member with rank rather than reason.

Even under the Uniform Code, the Law Officer is not a free man. Under the military system, a high-ranking officer is the "convening authority". He appoints the court members, the personnel of the prosecution and the defense, and the Law Officer. He refers individual cases to trial after his staff has reviewed them for "legal sufficiency". The Law Officer thus knows, at the time of trial, that his superiors have already approved the prosecution's case.

In a decision published last fall, an Air Force Board of Review found a case in which the Law Officer had

ruled against the prosecution. The prosecutor obtained a recess and returned to the courtroom to announce that the convening authority disagreed with the ruling. The Law Officer reversed himself.

The Board of Review described the Trial Counsel's maneuver as a ". . . defiant act . . . apparently taken for the sole purpose of bolstering what had been, to that point, a losing position." Reversing the conviction, the Board held ". . . that the Trial Counsel's solicitation and utilization of command authority could reasonably be interpreted by the Law Officer and all the members of the court to have ominously suspended above them the power and authority of their commander's office."

If Law Officers were assigned to Army, Navy and Air Force headquarters in the Pentagon, working out of convenient regional offices, they could be truly full-time judges independent of the commands in which they sit. Certainly the situation would not be improved by removing what independence the Law Officer may now enjoy.

Although the Law Officer could be more effective if independently assigned, the court members must ordinarily be chosen from within the command so that they are all available for trials when needed. The Armed Services have been persistent and ingenious in their efforts to control the court members. In September of 1953, a Navy court martial was made up of some members who had nothing else to do but act as professional jurors. The admiral, who was president of the court, a job comparable to that of the civilian jury foreman, wrote fitness reports on these subordinates, based on his opinion of their performance on his court.

Reversing the case, the Court of Military Appeals held that, "A court member's freedom and independence of action must remain inviolate. For his actions and his motives he should be responsible only to God and his conscience."

One judge observed that "the reporting officer is so strategically positioned that he hears all, sees all, knows all, and can report on all. He is the captain who plots the course to be followed and the deviates are well known to him. A fair and just trial cannot flourish in that climate."

Another problem which the services seek to solve is the right of appeal to the Court of Military Appeals. In the opinion of the military lawyers, too many men convicted by courts martial now ask the court to review their cases without listing specific errors in their requests. This causes delay in disposing of these cases, since the convictions do not become final until after the Court denies these general requests.

## Ending the "Inconvenience". . *The "Judicial Appeals Board"*

The Air Force has asked Congress to end this inconvenience by establishing a three-man "judicial appeals board" for each branch of service. Before asking the Court of Military Appeals to review his case, the accused would first be required to obtain a "certificate of good cause shown" from this new board. The accused would present his request to the appeals board and, if any one of the members agreed that his case had merit, he would be allowed to send his petition to the Court of Military Appeals.

Today, the last military review of a case is conducted before Boards of Review in Washington, D.C. These boards, each composed of three senior legal officers, are actually a kind of appellate court. Both sides are represented by counsel and the opinions of the boards are published and distributed throughout the Armed Forces.

An interesting feature of the Air Force proposal is that it would not specifically forbid a member of the Board of Review from sitting on the new appeals board for the same cases. The accused might then be faced with the problem of convincing men who have already decided his case unfavorably that he ought to be allowed to carry his appeal higher.

The important feature of the plan, though, is that the Services would completely control the right of the accused even to request that the Court of Military Appeals hear his case. Although the military lawyers have complained about the amount of work which the present procedure places on the court, the judges of the court have not protested and have described previous plans to limit appeals as undesirable.

The Court of Military Appeals makes its own rules of practice and procedure. If the judges ever decide that the situation is out of control, they can require each petition for grant of review to list the specific errors in issue and could refuse to accept petitions which do not do so. Such a procedure would appear more desirable than permitting the Armed Services to decide for themselves which cases should be aired in the highest court.

The Armed Services certainly have the right and duty to suggest to Congress any changes in the law which they feel necessary. The dangerous feature of the proposals made by the Judge Advocates General is their tendency to describe these amendments as economy measures or mere procedural reforms.

Maj. Gen. Reginald C. Harmon, the head Air Force lawyer, points out that "the most recent budget request needed to operate the Court [of Military Appeals] for one year amounted to $320,000". He predicts that the court's wartime cost would be four times the present expense if twelve million men were in uniform as in World War II. General Harmon also deplores "the added transportation costs arising from forwarding the records of trial to Washington D.C." in wartime.

There is no doubt that military justice is expensive. Military justice is also big business—bigger than the business of the civilian federal courts.

During 1954, there were 247,000 courts martial of all kinds held throughout the world. A total of 18,594 cases were reviewed by Boards of Review in the Army, Navy, Air

Force and Coast Guard during the year and 1,829 cases were docketed by the Court of Military Appeals, less than one per cent of the cases tried.

In comparison, 101,269 civil and criminal cases were brought in the federal district courts during fiscal year 1954, 3,481 cases were filed in the civilian Courts of Appeals, and 520 petitions for writs of certiorari were docketed in the United States Supreme Court.

There is no doubt that curtailing the soldier's rights against self-incrimination, eliminating the thorough and impartial pre-trial investigation, and stripping the Law Officer of his independence might cut the costs of operating the Court of Military Appeals, since the records which do somehow reach the court are likely to contain little to review.

Although it is hard to believe that some delay in the small percentage of cases which are appealed to the Court would actually "jeopardize the success of military missions", as Admiral Nunn has predicted, it is also apparent that there are ways to keep cases from ever reaching the Court in the first place.

The real question is, however, whether the possibility of a million dollar wartime court budget, a bigger postage bill, and a few months delay in handling less than one per cent of the military cases are enough reason for taking from the serviceman rights given by Congress only after careful study and loud public outcry against "drumhead justice" during World War II.

# Notice of Annual Meeting of Members and of Proposed Amendments of By-Laws of American Bar Association Endowment

■ The annual meeting of members of American Bar Association Endowment will be held during the week of the Annual Meeting of the American Bar Association, August 27-31, at Dallas, Texas, for the following purposes:

1. Acting upon a proposed amendment to existing Article II of the By-Laws, as follows:

(a) In Section 1, strike out the words "At the annual meeting of members held in 1947 one director shall be elected to hold office for the term of one year, one for the term of two years, one for the term of three years, one for the term of four years and two for the term of five years. After 1947", so that Section 1 of said Article II will read as follows:

Section 1. The affairs of the corporation shall be managed by a Board of ten Directors. Two directors shall be elected annually by the members from their own number, to hold office for the term of five years or until their successors are elected.

(b) Add to Article II three new Sections, as follows:

Section 3. Two regular meetings of the directors shall be held each year, viz.: at the annual meeting of the American Bar Association and at the midyear meeting of the House of Delegates. Special meetings may be held upon call of the President, the Vice President or any three directors.

Section 4. The directors shall appoint an Executive Committee consisting of three of their own number, with power to act between meetings of the directors.

Section 5. The directors may create such standing and special committees, to be appointed by the President, as they may consider necessary.

2. Transacting such other business as may come before the meeting.

The purpose of the proposed amendment is to drop from Section 1 certain language that was necessary in order to set up the present plan for the election of two directors each year; as to Section 3 to provide for two regular meetings of the directors each year and for the calling of special meetings; as to Section 4, provision for the appointment of an Executive Committee, and Section 5 for the creation by the directors of Standing and Special Committees.

These changes are necessary in order to implement the operation of the present life insurance plan in which the Endowment is engaged.

All members of the American Bar Association are members of the Endowment.

# Hartford Regional Meeting Held in April

■ The American Bar Association's regional meetings program for 1956 had a highly successful beginning April 15-18 in Hartford, Connecticut. More than 1,000 lawyers from seven Northeastern states registered for the four-day meeting. The balanced program of professional and social events demonstrated again the value of regional meetings in enabling more lawyers to participate personally in Association activities. States participating in the Hartford meeting were Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont and Connecticut.

The sessions in Hartford's new Statler Hotel began in the afternoon of April 15 with a reception at which the State Bar Association of Connecticut, the Hartford County Bar Association, the New Haven County Bar Association and the Bridgeport Bar Association were joint hosts. Well over seven hundred lawyers and guests attended.

At the opening Assembly session Monday, April 16, Association President E. Smythe Gambrell and United States Senator Clinton P. Anderson, of New Mexico, Chairman of the congressional Joint Atomic Energy Committee, were principal speakers. President Gambrell referred to the fact that the founder of the American Bar Association, Simeon E. Baldwin, was a native of Connecticut and added: "The quick response you of the several states have given to our call for this fine meeting is eloquent testimony to the common spirit and ideals which animate the legal profession."

Senator Anderson, discussing the insurance aspects of atomic energy development in a city which embraces the home offices of a number of leading insurance companies, declared that development of peaceful uses of the atom is seriously hampered by the lack of adequate insurance coverage. He said lawyers interested in the growing atomic energy industry foresee unique legal problems and liabilities stemming from nuclear accidents. Although the insurance industry has been working on the problem, and has indicated a willingness to act jointly in providing as much protection as possible, Senator Anderson said that "the atomic energy industry, almost unanimously, has indicated a reluctance to proceed without assurance that it will be financially protected to the full extent of potential liability". He added this had raised the possibility that the Federal Government may have to participate in the insurance program although "no one is very happy about the prospect of the government entering the atomic energy insurance field".

John D. Randall, Chairman of the House of Delegates, President-Nominee David F. Maxwell and Chairman Charles S. Rhyne of the Regional Meetings Committee were other American Bar representatives on the opening Assembly program. Representing the host Bar were Chief Justice Ernest A. Inglis of the Connecticut Supreme Court of Errors, and President David H. Jacobs of the State Bar Association of Connecticut.

Governor Abraham Ribicoff of Connecticut, greeting the visiting lawyers on behalf of the host state, took occasion to assert that Connecticut lawyers generally had failed to support a crackdown on highway speeding and had not vigorously supported judicial reorganization in that state. President Jacobs answered the Governor later in a statement, declaring that the Connecticut Bar had been "active for several years" in support of a statewide court integration plan. President-Nominee Maxwell of the American Bar Association also alluded to Ribicoff's remarks when he pointed out that the American Bar Association has had a traffic court program for over six years, and has been instrumental in initiating court reorganization in various states.

At the Assembly luncheon on April 16, Judge David W. Peck, Presiding Justice of the Appellate Division of the New York Supreme Court, First Department, delivered a notable address on "The Future of the Trial Lawyer". Declaring that the jury system in civil cases is "at the root" of congestion in the courts, he

**At Hartford Regional Meeting (left to right) Arthur M. Lewis, Hartford, President Gambrell and Cyril Coleman, Hartford.**

declared the legal profession must take the lead in expediting litigation if the trend away from the courts toward arbitration and administrative agencies is to be halted.

More than a dozen of the American Bar Association Sections and Committees sponsored panel discussions and seminars on special subjects in the three days of professional programs. These events included: a pre-trial demonstration sponsored by the Section of Judicial Administration; an administrative practices seminar sponsored by the Administrative Law Section; a labor relations and arbitration panel by the Section of Labor Law; an estate planning discussion by the Real Property, Probate and Trust Law Section; a trial tactics demonstration involving the preparation of medical evidence and the actual trial of a case involving traumatic injury to the heart, sponsored by the Insurance Law Section; a legal assistance conference, sponsored by the Committee on Legal Assistance for Servicemen; a seminar on zoning and planning, sponsored by the Municipal Law Section; a legal aid and lawyer referral conference; a Criminal Law Section conference; a discussion of problems of closely held corporations, sponsored by the Section of Corporation, Banking and Business Law; a seminar on income tax problems of small individually-owned businesses, sponsored by the Section of Corporation, Banking and Business Law; a seminar on income tax problems of small individually-owned business, sponsored by the Taxation Section and the Committee on Continuing Legal Education of the American Law Institute; and a workshop conference on traffic problems arranged by the Committee on Traffic Court Program.

In addition, the American Judicature Society held a luncheon meeting featuring a review of judicial reform movements in the Northeastern states, and the National Conference of Bar Presidents and the Section of Bar Activities arranged a joint breakfast meeting. No fewer than ten law schools held special alumni luncheons.

Unusual interest attached to many of the professional programs. More than 400 lawyers filled the Statler ballroom for the trial tactics program of the Insurance Law Section, at which three of the leading heart specialists in the East appeared as "witnesses" in the mock trial. They were Dr. Howard W. Sprague, of Boston; Dr. H. M. Marvin, of New Haven, and Dr. Paul H. Twaddle, of Hartford. Lawyers participating were Samuel M. Lane, New York; Joseph Schneider, Boston; David Goldstein, Bridgeport, and Joseph V. Fay, Jr., of Hartford.

The main banquet on the evening of April 17 was a gala event. Cyril Coleman, general chairman of the regional meeting, was toastmaster and speakers were President Gambrell and Sir Percy Spender, Australian Ambassador to the United States. Sir Percy discussed foreign aid programs, declaring the leading Western nations have put too much emphasis on military and political ties in aiding small nations.

"In the international field we cannot live alone, nor can we buy friendship", he said. "Our aid has to be without political attachments. Too often has the feeling emerged in some countries that we are trying to buy their allegiance to our ways of thinking and to our foreign policies in the world struggle. Too often we have stressed... the material achievements and advantages we enjoy. The result has been in some cases to drive these people not only into the neutralist camp but further away, in sympathy, from ourselves.

"We have neglected the spiritual angle. We have come with charity but there have been overtones of expediency which have in large measure nullified the effectiveness of our activities. We have to convince these people of our altruism, and to do that our national life must be of such character as to put us beyond criticism. We can win friendship with the proper spiritual approach."

Following the banquet, the Junior Bar Conference sponsored a dance which concluded the social phase of the program. During the first two days of the meeting there had been special tours of Hartford, luncheons and a fashion show for wives of registrants. The insurance companies of Hartford were joint hosts at a reception to all visiting lawyers and their guests.

The scene of the second regional meeting of 1956 will be Spokane, Washington, May 30 to June 2. This will be known as the Pacific Northwest Meeting, embracing the States of Idaho, Montana, Oregon, Utah and Washington, as well as Alaska. Members of the Bar in the Canadian provinces of Alberta and British Columbia also have been invited. The third and final regional meeting of this year will be in Baltimore, October 10 to 13.

### *Third Annual Summer Program for California Lawyers*

■ Three one-week courses are being offered by the University of California School of Law through the facilities of the Department of Continuing Education of the Bar from August 6 to 10. The courses, to be given at the University of California School of Law at Berkeley, will be on the following subjects: (1) Organizing and Advising Corporate Enterprises; (2) Current Developments in the Law of Torts; and (3) Secured Transactions Relating to Personal Property. There will also be a two-evening course on Estate Planning Picture Gallery.

Further information can be obtained from the Department of Continuing Education of the Bar, 2441 Bancroft Way, Berkeley 4, California.

# The 1954 Internal Revenue Code:

# Tax Problems in Connection with Divorces

by Darrell D. Wiles • *of the Missouri Bar (St. Louis)*

**■ This is another in a series of articles written by members of the Section of Taxation intended to acquaint members of the Bar generally with some of the more important aspects of and recent changes in basic tax law. A part of the emphasis in this series will be, when appropriate, on the Treasury Regulations. The entire series is being prepared under the supervision of the Publications Committee of the Section.**

■ The Internal Revenue Code of 1954 produced important statutory changes in the law applicable to alimony payments. The new provisions were intended to liberalize the scope of deductible alimony and, therefore, to equalize to a greater extent the tax burden between husbands and wives. As under the 1939 Code, there is a relationship between the deduction of alimony by one spouse and the corresponding receipt of income by the other spouse; Section 215 of the 1954 Code provides for a deduction of amounts includible in the income of the other spouse under Section 71. Judicial decisions under the 1939 Code are relevant to problems arising under the 1954 Code because certain basic requirements remain substantially unchanged.

## Classification of Payments

Alimony and separate maintenance payments are now deductible by the husband and taxable to the wife where payments are made (1) under a decree of divorce or separate maintenance, or under a written decree incident to such divorce or separation, (2) under a written separation agreement, and (3) under a decree of support, assuming certain other conditions are met. The last two provisions are new. The deduction by the husband is allowed in the taxable year of payment regardless of whether the husband is on the cash or accrual basis of accounting. The rules are the same in those extraordinary cases where the wife pays and the husband receives the alimony. (Section 7701 (a) (17)).

(1) *Decree of Divorce or Separate Maintenance.* The payments are includible in the income of the wife and deductible by the husband if: (a) the obligation to make payments has been imposed on or incurred by the husband under the decree of divorce or separation, or a written instrument incident to such a decree; (b) the payments are made in discharge of a legal obligation based on the marital relation directly or out of property transferred in trust or otherwise in discharge of such an obligation; and (c) the payments constitute "periodic payments". This provision is identical in substance with the old law.

(2) *Written Separation Agreement.* This provision was added to prevent discrimination against husbands and wives who have permanently separated and have made definite alimony arrangements by contract, although the parties have not obtained a court decree. The wife's gross income includes the alimony if: (a) the parties are actually separated; (b) the separation agreement is in writing and was executed after August 16, 1954; (c) the payments are made under the agreement and because of the marital or family relationship, directly or out of property transferred in trust or otherwise under the agreement and because of such relationship; (d) the payments constitute "periodic payments"; and (e) the parties file separate income tax returns. Since a court decree is not necessary, it is not necessary that husband and wife be *legally* separated, nor is it necessary that the written separation agreement be enforceable in a court of law. Sen. Rep. No. 1622, 83d Cong., 2d Sess. 171 (1954). In addition, the alimony payments become deductible immediately upon execution of the agreement. The new provision was made inapplicable to pre-existing agreements so as to preserve arrangements negotiated on the basis that the wife would not include the payments in

her income; the tax effects would usually have been taken into account in determining the size of the payments. However, this provision apparently can be made to apply to couples already separated under a pre-existing agreement by the execution of a new agreement. The tax benefits to a husband in high brackets in such a case would substantially exceed the increase in taxes to a wife in lower brackets so that the payments could be substantially increased to the mutual benefit of both parties.

(3) *Support Decree.* This second new provision relates to payments made by a husband to his wife under a decree requiring him to make payments for his wife's support or maintenance even though the decree is not one of absolute divorce or legal separation. The requirements are: (a) the parties must be actually separated; (b) the payments must be made under a decree entered after March 1, 1954; (c) the decree must require the payments to be made for the support or maintenance of the wife; (d) the payments must be received after August 16, 1954; (e) the payments must constitute "periodic payments"; and (f) the parties must file separate income tax returns. It should be noted that there is no provision under this section for alimony income attributable to transferred property as there is under the other two classifications discussed hereinabove.

The statute does not elaborate as to the kind of a decree contemplated. The Senate Finance Committee Report stated that this rule was added "to provide for the inclusion in the wife's gross income of periodic payments . . . received under a *court decree* . . . which requires the husband to make the payments for the support or maintenance of the wife." Sen. Rep. No. 1622, 83d Cong., 2d Sess. 171 (1954). On the other hand, since the statute is not specific in this regard but merely says "decree", apparently any decree which recognizes the separated status of the parties, provides for the support of the wife, and does not constitute a decree of divorce or separate maintenance will qualify. This would seem to include a decree providing alimony *pendente lite.* The Conference Report indicates any decree which is modified or altered by a court order entered after March 1, 1954, is to be treated as a decree entered after March 1, 1954. Thus, pre-existing support decrees can easily be made subject to the new provisions, and again the tax benefits not previously available might justify an increase in payments. H. R. Rep. No. 2543, 83d Cong., 2d Sess. 23 (1954).

### *Periodic and Installment Payments*

The all-important term "periodic payments" is not defined in the Code, but court decisions and rulings indicate that "periodic payments" include (1) payments to be made in a fixed amount for an indefinite period or (2) payments to be made in an indefinite amount for a fixed or indefinite period. For example, a divorce decree obligates a husband to make monthly payments of $100 to his wife until she remarries or dies; or the decree obligates the husband to pay to his wife 30 per cent of his variable monthly income, the payments to be made monthly for a period of five years. These are both periodic payments. On the other hand, a lump-sum payment is not periodic; if the decree or written separation agreement provided for a lump-sum settlement of $60,000 (cash or property), no part of the $60,000 is includible in the wife's income or deductible by the husband.

However, installment payments of a fixed principal sum may or may not qualify as "periodic payments". Section 71(c) provides that installment payments in discharge of a "principal sum" specified in the decree, instrument or agreement are not periodic payments unless the installments may or will be made over a period ending more than ten years after the date (interpreted as meaning effective date) of the decree, instrument, or agreement. In such case the installments qualify as periodic payments only to the extent of 10 per cent of the "principal sum". The 10 per cent limitation applies to installment payments made in advance, but does not apply to delinquent installment payments for a prior taxable year of the wife made during her taxable year. Back alimony is deductible in the year paid if it would have been deductible in the ordinary course.

By way of illustration, a divorce decree granted in 1952 obligated a husband to pay his wife $60,000 in installments of $5,000 for twelve years. Both husband and wife report income on the calendar year basis. The husband made a $5,000 payment in 1952, made no payment in 1953, but in 1954 paid $15,000 which represented $5,000 of back alimony for 1953, $5,000 of alimony for 1954, and an advance payment of $5,000 for 1955 alimony. The 1952 payment of $5,000 is taxable to the wife and deductible by the husband. For 1953 nothing is taxable to the wife or deductible by the husband. For 1954, $11,000 is taxable to the wife and deductible by the husband. The $11,000 is made up of the $5,000 back alimony for 1953 and $6,000 (as limited to 10 per cent of the principal sum) for the 1954 and 1955 alimony payments.

The distinction between a deductible periodic payment and a nondeductible installment payment represents the most litigated issue in this entire field and even now the courts are not in agreement. The usual question is whether a principal sum has been specified in the decree, agreement or instrument where the installment payments are subject to reduction or discontinuance in the event of the happening of contingencies. The Tax Court holds that a principal sum is specified regardless of the fact that the obligation to make payments thereon may be terminated or reduced by the happening of contingencies such as the termination of the payments upon the death or remarriage of the wife. Accordingly, the Tax Court treats such payments as non-deducti-

ble installment payments of a principal sum where the ten-year test is not met. *J. B. Steinel,* 10 T.C. 409 (1948); *Estate of Frank P. Orsatti,* 12 T.C. 188 (1949); *Clay W. Prewett, Jr.,* 22 T.C. 270 (1954) rev'd. 221 F. 2d 250 (8th Cir. 1955). On the other hand, the Tax Court has held in two cases that the alimony was deductible as periodic payments even though the period of payment was limited to less than ten years where there was no reference to a fixed amount and the amount to be paid was uncertain and indefinite because the payments were geared to the husband's income which was clearly of a fluctuating character. *Roland Keith Young,* 10 T.C. 724 (1948); *John H. Lee,* 10 T.C. 834 (1948). But in a similar case where the husband's earnings were comparatively stable, the installment payment limitations were held applicable. *James M. Fidler,* 20 T.C. 1081 (1953) rev'd – F. 2d – (9th Cir. 1955); 55-1 U.S.T.C. Par. 9263.

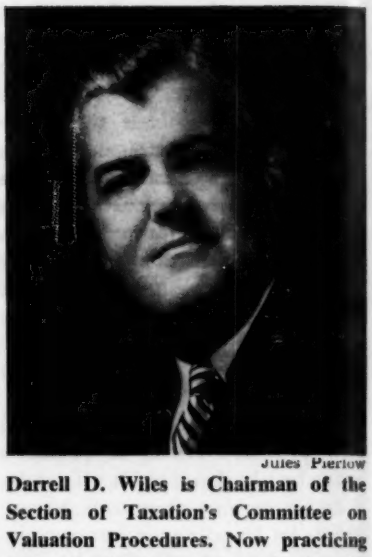
The Courts of Appeals which have decided the issue, in revoking or modifying prior Tax Court decisions, have indicated that "principal sum" implies an amount of a fairly definite character, and therefore carries with it no suggestion of uncertainty. Thus, where installment payments would be terminated in the event of the death or remarriage of the wife, or a reduction in the event of a decrease in the income of the husband, the Courts of Appeals have held the husband's promise to pay incapable of being mathematically calculated as a certain obligation with the result that the payments were periodic payments and not installment payments of a principal sum. *Smith's Estate* v. *Commissioner,* 208 F. 2d 349 (3d Cir. 1953); *Baker* v. *Commissioner,* 205 F. 2d 369 (2d Cir. 1953); *Myers* v. *Commissioner,* 212 F. 2d 448 (9th Cir. 1954); *Prewett* v. *Commissioner,* 221 F. 2d 250 (8th Cir. 1955). It is uncertain whether the Tax Court will continue to hold that such payments are not periodic in view of the imposing number of reversals by the Courts of Appeals.

As respects alimony arrearages paid in lump-sum, the rule is that if the arrears would have constituted periodic payments if paid when due, receipts of such arrearages in a lump-sum are regarded as receipts of periodic payments—taxable to the wife and deductible by the husband. *Grant* v. *Commissioner,* 209 F. 2d 430 (2d Cir. 1953).

### *Alimony Income Attributable to Property Transferred*

Section 71 (a) (1) and (2) provides that the wife is taxable in full not only on amounts received directly from her husband for alimony, but also on income attributable to property transferred "in trust or otherwise" in discharge of a legal obligation incurred by the husband under a decree of divorce or a decree or written agreement of separation. In other words, the source of the periodic payment is immaterial. The provision taxing alimony payments to the recipient is equally applicable to property in trust, to life insurance, endowment or annuity contracts, or to any other interest in property, and to all payments, direct or indirect, by the obligor husband from his income or capital. Thus, suppose a husband, as part of a divorce settlement, creates a trust to which he transfers property estimated to yield an income of at least $1,200 annually, the entire net income of the trust being payable to the wife for her support. The husband is not taxable on any part of the income of the trust; instead, the income currently distributable is taxable entirely to the wife.

On the other hand, payments from a trust to a wife who is divorced or legally separated (or separated under a written separation agreement), which are not received under the circumstances of Section 71, such as a trust created before divorce or separation and not in contemplation of it, are taxable to the wife under Section 682 of the 1954 Code. Section 71 has reference to a trust to which the husband has transferred property in discharge of a legal obligation incurred by the husband under the divorce decree or decree or written agreement of separation, but Section 682 has reference to any trust, any part of the income of which the wife is entitled to receive. It may be a trust created voluntarily by the husband, apart from and not incident to the decree of divorce or separation, but over which he retains substantial control; or it may be an estate or trust of which he is the beneficiary, the husband having requested the trustee to pay the income over to his wife.



Jules Pierlow

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### *Support of Minor Children*

Payments made specifically for the support of minor children under the terms of a decree, instrument or agreement, and identifiable as such, are not taxable to the wife or deductible by the husband. Section 71 (b). If the husband pays less than the amount specified in the decree, instrument or agreement, the amount paid is considered as first applied in payment of the obligation for child support. However, if the husband makes periodic payments to his divorced wife as alimony and as child support, and the decree, instrument or agreement under which the payments are made does not allocate part as alimony and

part as child support, or the amount or portion of payments for the support of such minor children is not identifiable, then the entire amount of the payments are taxable to the wife and deductible by the husband. *Henrietta S. Seltzer,* 22 T.C. 203 (1954).

### *Payments of Life Insurance Premiums*

The employment of life insurance as security for or a supplement to alimony payments has become rather common practice. The Internal Revenue Service has ruled that premiums paid by the husband on a life insurance policy absolutely assigned to the wife and with respect to which she is the irrevocable beneficiary are taxable income to the wife and deductible by the husband. Premiums paid by the husband on insurance which is not assigned to the wife and with respect to which she is only the contingent beneficiary are neither taxable to her nor deductible by him. I.T. 4001, 1950-1, C.B. 27. More recently in *Seligmann* v. *Commissioner,* 207 F. 2d 489 (7th Cir. 1953), the Seventh Circuit held that life insurance premiums are not alimony unless the wife's "economic benefit" from payment of the premiums can be measured in dollars and cents. If the right to receive the proceeds is subject to contingencies, such as having to survive the husband or remaining single, then her "economic benefit" can not be measured and the premiums are not includible in the wife's income (and correspondingly would not be deductible by the husband by reason of the interdependence of Sections 71 and 215). Apparently the Tax Court subsequently has followed this view with the result that it now holds generally that the policies either must be assigned to the wife or else she must realize present financial benefit from the premium payments in order to be taxable on them, *Leon Mandel,* 23 T.C., No. 1 (1954); *Beulah Weil,* 22 T.C. 612 (1954).

Premiums on life insurance which is merely security for alimony payments are not taxable to the wife or deductible by the husband. *Blumenthal* v. *Commissioner,* 183 F. 2d 15 (3d Cir. 1950); *Baker* v. *Commissioner,* 205 F. 2d 369 (2d Cir. 1953); *Lemuel Alexander Carmichael,* 14 T.C. 1356 (1950).

If a husband makes an absolute assignment of a life insurance policy to his wife the transaction is considered a property settlement equivalent to a sale of the policy by the husband in consideration for the discharge of his obligations arising under the decree. The husband realizes taxable gain measured by the excess of the fair market value of the policy over the net premiums paid as of the date of assignment. See *infra.*

## Property Settlements Incident to Divorce

Divorce or separation generally involve substantial modifications of property rights as well as personal rights. In many divorces and separations, property will be transferred by one party to another in addition to the support or alimony to which the wife ordinarily is entitled. It is not unusual for property settlements to be incorporated in the divorce decrees or separation agreements.

### *Income Tax Aspects*

The term "alimony" includes payments in settlement of property rights just as the term includes payments for maintenance and support of the former wife. Like other alimony payments, in order for property settlement payments to be taxable to the wife and deductible by the husband, they must qualify as periodic payments. If separate provision is made in the decree of divorce or written separation agreement for the property settlement and for continuing maintenance or support, then the status of each type of payment will be determined separately. Thus, a lump-sum payment to purchase a home or other fixed payments made in a lump-sum or over a period of ten years or less (such as the sum of $25,000 in five equal annual installments in addition to monthly support payments of $300 a month for the wife's life or until she remarries), are not taxable to the wife or deductible by the husband.

A transfer of property in discharge of a property settlement agreement usually will be treated as a sale or exchange on which gain is recognized; the husband realizes gain to the extent that the fair market value of the property transferred exceeds its adjusted basis, and the wife thereafter has a basis equal to the fair market value, *Commissioner* v. *Halliwell,* 131 F. 2d 642 (2d Cir. 1942); *Comissioner* v. *Mesta,* 123 F. 2d 986 (3d Cir. 1941); *Commissioner* v. *Patino,* 186 F. 2d 962 (4th Cir. 1950); *Edna W. Gardner Trust,* 20 T.C. 885 (1953). Under the provisions of Section 1239 of the 1954 Code, if depreciable property is transferred, the gain thereon would constitute ordinary income if the parties are still married at the time of the transfer.

If the basis of the property exceeded its value at the time of transfer, the loss would not always be allowable. If the transfer occurs prior to divorce or, probably simultaneously therewith, Section 267 disallowing the deduction of losses from sales or exchanges between spouses would be applicable. If the transfer is made after the divorce is obtained, the loss might be non-deductible under either Section 262 which prohibits deduction of personal, living or family expenses, or Section 165 which permits deduction of losses incurred by an individual only if incurred in a trade or business or in a transaction entered into for profit. Thus, if a loss is incurred upon the transfer to a wife of property which was used neither in trade or business nor for investment purposes, such as the personal residence, the loss will not be allowed by the latter section. Even when investment property is involved, if the transfer is considered solely as part of the divorce it is not entirely clear that the loss may be deducted because divorce is not a transaction entered into for profit, as such term is used in

Section 165. See *Frances R. Walz, Administratrix,* 32 B.T.A. 718; but see *Jessie Lee Edwards,* 22 T.C. 65 (1954).

### *Gift Tax Considerations*

The most important litigation regarding marital property settlements has dealt with the gift tax consequences of such settlements. Under the 1939 Code there was no specific provision with respect to property settlement. Various special rules, however, have been developed.

The Commissioner originally ruled in E.T. 19, 1946-2 C.B. 166, that property transfers incident to divorce or legal separation to the extent made in satisfaction of rights of support are made for an adequate and full consideration in money or money's worth and hence are not subject to gift tax liability. However, the ruling stated that such transfers were subject to gift tax liability to the extent that they are made for a relinquishment of dower, curtesy or similar statutory rights in the transferor's property. The Commissioner was upheld in this latter position by the Supreme Court in *Harris* v. *Commissioner,* 340 U.S. 106 (1950), subject to the important exception that no gift tax liability was incurred when such a transfer was made pursuant to a divorce decree, or pursuant to an agreement incorporated into such a decree.

The *Harris* case with its technical distinction between settlement agreements incorporated into court decrees and those not so incorporated did not supply a completely clear and satisfactory test. To remedy this situation, Congress provided in the 1954 Code that when transfers are made pursuant to a separation agreement and divorce occurs within two years thereafter, such transfers as are made to a spouse in settlement of his or her marital or property rights or to provide a reasonable allowance for the support of issue of the marriage during minority will be deemed to be transfers made for a full and adequate consideration in money or money's worth and, therefore, not taxable gifts. Section 2516. This is effective as to transfers made after January 1, 1955. It should be noted, however, that since Section 2516 applies by its terms when "divorce" occurs, it apparently does not cover those situations where merely a decree of separation or separate maintenance is obtained. Such cases continue to be governed by the case law and rulings.

### *Estate Tax Aspects*

As respects the estate tax, Section 2043 of the 1954 Code provides that a relinquishment or promised relinquishment of dower or curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth". This is the same as under the 1939 Code. Thus, a transfer in consideration of marital rights remains subject to the estate tax because it is not a transfer for full consideration, and it does not give rise to a deduction from gross estate. Section 2053 provides that if a claim against the estate is founded upon a promise or agreement, the deduction therefor is limited to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth. Therefore, it appears that when the basis of the wife's claim is a mere agreement (no court decree of any kind) the commuted value of her claim is deductible for estate tax purposes only to the extent the consideration for the agreement was her release of her support rights.

On the other hand, even if the consideration is the wife's release of her marital (inheritance) rights in the husband's estate, the commuted value of her claim may be deductible for the purposes of the husband's estate tax provided the unexecuted obligation has been incorporated in a divorce or separation decree. (Section 2053, 1954 Code; *Commissioner* v. *Maresi,* 156 F. 2d 929 (2d Cir. 1946); *Commissioner* v. *State Street Trust Co.,* 128 F. 2d 618 (1st Cir. 1942). The Internal Revenue Service may continue to resist such a deduction where the decree merely approves the agreement in the absence of a provision in the agreement making such a decree a prerequisite to validity of the obligation placed upon the husband's estate. E.T. 19, 1946-2 C. B. 166.

With regard to life insurance, frequently the husband will transfer to the wife in a property settlement agreement a life insurance policy upon his life on which he had previously paid the premiums. Under the provisions of Section 2042 of the 1954 Code, if the husband retains no incidents of ownership, the insurance will not be includible in his estate.

With respect to the taxation of alimony and separate maintenance support payments, the Internal Revenue Code of 1954 made significant statutory changes by introducing new provisions regarding separation agreements and decrees for support; these provisions greatly liberalized and expanded the number of instances in which the husband may now be entitled to a deduction for payments made to a former wife. By contrast, the 1954 Code had a very limited effect upon taxation of property settlements incident to divorce or separation; Congress acted only to clarify and extend the rule of the *Harris* case with respect to the gift tax. The new Code has not endeavored to change the income and estate tax consequences of such settlements, and Congress has made no effort to eliminate the uncertainties existing in this area. Perhaps improvements will appear in the next substantial revision of the taxing statutes.

**Editor's Note: It should be noted that recently proposed regulations under Section 71 were issued subsequent to the preparation and submission of this article.**

# Progress in Florida:

# The Judicial Council and Its Work

By **A. Bradford Smith** · *of the Florida Bar (Gainesville)*

**▪ Judicial reform is a slow, often almost painful process, as many hard-working lawyers and other civic-minded citizens can testify if they have ever taken part in movements to secure better administration of justice. Mr. Smith writes of the experience in Florida and the efforts of The Florida Bar to change that state's antiquated judicial machinery.**

▪ As our country has grown and the State of Florida has increased in population by leaps and bounds (1,897,414 in 1940 and an estimated 3,100,000 in 1954), it has become more and more apparent that the judicial systems of many states were inadequate. Justice in the State of Florida has become too slow. It often takes several years from the inception of a court action to a final determination by the state's supreme court, and delayed justice may be no justice at all. To be brief, our highest court is bogged down with work. Appeals filed now would be set for oral argument over fifteen months from today. Also, judicial manpower at the trial court level is being wasted by the inflexibility of the system, as judges cannot readily be shifted where the need is greatest. These inadequacies are not only found in Florida but are manifest in many states. Various statewide reforms have been accomplished among which New Jersey stands as a beacon on the road to progress.[1] Other states such as Illinois are in the process and will soon succeed.[2]

The system in Florida was inflexible from the date the Constitution of 1885 came into being. Courts are set up by the Constitution, and one county has a court it can call its very own.[3] Additional judges to handle the case load increase can be added to the Supreme Court and County Judge's Court only by amending the Constitution. The Circuit Courts get an additional judge when the increase of population in a circuit reaches a stated amount, but quite often the case load is geared to other factors such as the economic well being of an area and jurisdictional requisites. Many suits must be filed at the state capital. That particular circuit is now seeking an additional circuit judge, but assistance now depends upon adoption of a constitutional amendment, after a special census disclosed that the rapid growth in population was not quite enough to give that circuit the help it needed.

It was necessary over the years for the legislature to create special courts to handle increasing litigation. Small claims courts, juvenile courts, civil claims courts, traffic courts and criminal courts were established with little regard for administration or uniformity. Each judge is responsible for the conduct of his office, and, if the docket becomes overcrowded, in most instances, it just stays that way. If the judge has little to do, there is no provision for the shifting of judges from county to county other than the Circuit Courts and County Judge's Courts, and these constitute an involved process. One county was able to acquire an additional county judge by constitutional amendment, but it should not be necessary to amend the Constitution to obtain additional judges when the need arises and the regular case load justifies it. The administration of some of these courts has suffered from lack of funds. County judges, who handle mostly criminal and probate work, and small claims judges operating in small counties suffer from lack of clerical help due to the outmoded fee system. These offices are largely dependent upon fees from

1. Joseph T. Karcher, *New Jersey Streamlines Her Courts*, AMERICAN BAR ASSOCIATION JOURNAL, September, 1954, page 759.

2. Barnabas F. Sears, "A New Judicial Article for Illinois," AMERICAN BAR ASSOCIATION JOURNAL, September, 1954, page 755.

3. Escambia County Court of Record, Article V, Section 1, Constitution of Florida. A proposal to rectify this situation was turned down by the electorate in 1952. See Senate Joint Resolution No. 993, Laws of Florida, 1951. It will again be on the ballot in November, 1956. See Senate Joint Resolution No. 1052, Laws of Florida, 1955.

the sale of licenses and filing fees to provide funds to operate and to pay salaries. Some of the small claims judges have resigned for this reason. If a county needs a particular judge or a judge needs clerical help, funds should be provided for this purpose. Functional offices should not be dependent upon fees for their existence. As to uniformity, Florida now has thirteen different categories of courts, and twelve of these are trial courts. Even within a single category, a court's jurisdiction varies from county to county. For example, a Circuit Court's civil jurisdiction will range from a low of $100 in one county to $5000 in another, depending upon the existence of some special court. Some of the Small Claims Courts have been created by general statute and others have been established by various special acts. As a result, the filing fees and jurisdiction vary from court to court and make for a confusing situation to persons using the Small Claims Courts extensively.

## A Record of Defeat . . . *Past Attempts at Reform*

Various groups in Florida in recent years have sought to better the administration of justice. Unfortunately, most of the more important proposals have met with defeat. The Citizens' Constitution Committee, created in 1950 by persons interested in constitutional reform, proposed that a new judiciary article be adopted. The Constitution Committee of The Florida Bar also drafted a judiciary article, and co-ordinated its effort with the Citizens' Constitution Committee. Much work has been done by these two groups, but, to date, their efforts have availed them nothing. The Florida Bar sponsored an amendment to the judiciary article in the 1951 legislature which passed.[4] This amendment would have increased the membership of the Supreme Court from seven to ten and would have provided for administrative control of the state court system by the Supreme Court through its Chief Justice. The amendment was rejected by the electorate in November, 1952. A joint committee was set up by the legislature in 1951 to study the fee system as a means of compensating county officials (which includes local judges). After two years of study, this committee introduced a bill in the 1953 session to abolish the fee system and place the various county officers under budgetary control. The bill failed to pass. A similar measure failed in the 1955 session.

Three major proposals pertaining to the administration of justice have been adopted in the past twenty years. The Circuit Courts were reorganized and the number of circuits reduced in 1935 by constitutional amendment and subsequent legislation.[5] However, it later became necessary to add an additional circuit which was also accomplished by constitutional amendment.[6] The Supreme Court adopted the new Florida Common Law and Equity Rules in 1950. These new rules were patterned after the Federal Rules of Civil Procedure, and have been constantly improved. The 1953 legislature appropriated funds for full-time research assistants to the justices of the Supreme Court.[7] This has relieved the justices of a good share of their burden, but they cannot delegate the responsibility for the consideration and decision of cases. The creation of research assistants has not provided a cure for an over-loaded court, and the quest for a more efficient administration of justice has continued.

## Court Reform . . . *The Judicial Council*

The Florida Bar sponsored a successful bill in the 1953 session of the legislature creating a judicial council.[8] The Council is composed of a supreme court justice, who is the presiding officer, a circuit judge and a county judge, the attorney general, four members of the Bar, and nine laymen. All are appointed by the governor, and their terms are staggered, six members being designated for a three-year term, six for two years and five for one year. Outstanding leaders at the Bar, in government and business in the state have been appointed to the Council.[9] The Council was created to make a continuous study of the organization, procedure, practice and work of the Florida courts, including all matters concerning the administration of justice. Specifically, the Council was charged with:[10]

> (1) Surveying the organization and procedure of courts presently operating in the state, the volume of the work of each, and the manner in which the cases were being determined;
>
> (2) Collecting and analyzing statistics reflecting the number of cases entertained by the various courts;
>
> (3) Receiving and considering criticisms and suggestions from all sources relevant to the administration of justice;
>
> (4) Recommending from time to time to the legislature changes in the organization, jurisdiction, operation, procedure and methods of conducting the business of the courts; and
>
> (5) Filing with the Governor a report of its proceedings and recommendations and the results thereof.

Although the 1953 law carried no appropriation, the members of the Council labored diligently at their task and meetings were held in all sections of the state. Members attended at their own expense, yet absenteeism was low, while they contributed their time freely in the effort. All meetings have been open to the public, and opportunity has been given those present to air their views. The proceedings have been conducted in an informal manner, and this relaxed environment has assisted members of the Council and citizens to present their ideas candidly. The Chairman, Supreme Court Justice Elwyn Thomas, has stated that anyone can be heard, and, as most votes are *viva voce*, interested bystanders can even slip

4. Committee Substitute for Senate Joint Resolution No. 290, Laws of Florida, 1951.
5. Article V, Section 45, Constitution of Florida and Sections 26.01 *et seq.*, Florida Statutes, 1953.
6. Article V, Section 51, Constitution of Florida, adopted in 1950.
7. Section 282.01 (57), Florida Statutes, 1953.
8. Section 43.15, Florida Statutes, 1953.
9. Individual members of the Council were featured in an article by Herbert U. Feibelman, *Florida's Judicial Council*, THE FLORIDA BAR JOURNAL, March, 1954.
10. FIRST ANNUAL REPORT OF THE JUDICIAL COUNCIL, page 2.

in a vote now and then. One result has been an expression of support from the newspapers over the state for the work the Council is doing.

Their effort has resulted in legislative approval of a new judicial article[11] and an appropriation of $20,000[12] for the next biennium, as the work of the Council has just begun. Advocates of court reform are uniting their efforts in support of this amendment, as it must first be approved by the electorate before becoming a part of the Constitution. One local bar association has gone on record as opposed to the creation of an additional court in that county in anticipation of statewide reform. The Council's approach will pay big dividends when the new judiciary article appears on the ballot. (In the past, there has been a marked aversion to acceptance of piecemeal constitutional change. Ten of eleven constitutional amendments were rejected by the electorate in 1952.)

What technique has been used by the Council in its approach to its work? The Council first heard a statement as to the magnitude of the undertaking and some of the problems involved by Dr. Shelden D. Elliott, Director of the Institute of Judicial Administration of New York City. At the next meeting, five areas were selected for study: (1) appellate courts and procedures, (2) selection and tenure of judges, (3) trial court organization and procedure, (4) effective use of jurors and other laymen and (5) administrative direction of the court system. It was agreed that the work be assigned to seven committees, or "Task Forces", of the Council. These were designated Appellate Courts; Trial Courts; Selection, Tenure, Compensation and Retirement of Judges; Jurors; Draft; Statistics; and Public Relations, Policy and Information. The Council realized that any reform would be superficial unless the present Constitution were amended. It consequently adopted a resolution that a complete revision of the judiciary article be prepared and that "an extraction thereof limited to the appellate level" be also drawn, but that final decision as to which plan would be eventually recommended to the legislature be deferred.[13] The alternative plan was to be submitted if the Council felt that the legislature would not accept a complete revision, and ultimately, this was the policy pursued. Statistics were gathered on the case load of all the courts in the state, various problems were discussed, and a preliminary draft of the judiciary article was prepared. The first preliminary draft was studied, discussed and refined many times prior to final recommendation to the legislature last spring.

What are some of the ideas that have been considered by the Council, and what were the legislative results? The immense case load of the Supreme Court caused the Council to consider and recommend the creation of District Courts of Appeal. This feature was adopted by the legislature and included in the proposed amendment. If the amendment is adopted by the people, the state would be divided geographically into three districts. Each court, composed of three judges, would sit in various places within a district hearing appeals close to their source. This proposal would make appellate courts more easily available to the litigant and cases would be heard on the original record, thereby saving much expense. Emphasis has been placed on the fact that most appeals would terminate in the District Courts of Appeal. This court would not be "just another step in the appellate process" resulting in more costly and prolonged litigation. Appeals could be taken directly from trial courts to the Supreme Court, as a matter of right, only from judgments imposing the death penalty and judgments or decrees construing a provision of the state or federal constitution, directly passing upon a federal statute or treaty or upon the validity of a state statute other than a special or local law. Appeals could be taken from the District Courts of Appeal to the Supreme Court only from a decision which for the first time in the case construes a provision of the state or Federal Constitution, or directly passes upon a federal statute or treaty or upon the validity of a state statute as above. The Supreme Court could also review by certiorari decisions of District Courts of Appeal that affect a class of constitutional or state officers, or that hold a statute other than a special or local law to be invalid as applied to a specific state of facts. Other matters that could be reviewed by certiorari are questions of great public interest and conflicts between decisions of the District Courts of Appeal or Supreme Court on the same point of law. The Supreme Court could also issue writs of mandamus and quo warranto in specified instances such as when a state officer, board or commission is named as respondent. The District Courts of Appeal could hear all other appeals from final judgments and decrees of the trial courts including review of interlocutory orders or de-

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11. Committee Substitute for House Joint Resolution No. 810, Laws of Florida, 1955.
12. Chapter 29966, Laws of Florida, 1955.
13. First Annual Report of the Judicial Council, page 14.

crees in chancery cases. These courts could also issue writs of habeas corpus, mandamus, certiorari, quo warranto, and all other writs necessary or proper to the complete exercise of their jurisdiction.

The consideration of the appellate problem has focused the attention of the Council on the operation of the court system and the Supreme Court if the article is adopted. The Council considered the merits of giving the Chief Justice of the Supreme Court administrative authority over all the courts of the state, and made such a recommendation to the legislature. This would have provided one office from which information and statistics could be gathered and assignments of judges made on the basis of need for judicial timber. Another advantage of this administrative authority would be the uniformity which could be achieved in the practice and procedure of all the courts. As finally approved by the legislature, the main administrative feature of the proposed judicial article was deleted, but the legislature did approve authority in the Chief Justice to make assignment of judges and the feature empowering the court to adopt uniform rules governing the practice and procedure in all courts. The proposal is quite a large step in the right direction, even though full administrative authority as found in the federal system was denied.

The Council has devoted much time to "the questions of eligibility for judicial appointments, the means of selecting Chief Justices of the Supreme Court, and the supervision by the Supreme Court of the admission to practice in the State of Florida and the discipline of members of the Bar."[14] Supervision over admission to the integrated Bar was attained when the 1955 legislature formally abdicated this field and declared it to be a judicial function,[15] and the Supreme Court has delegated to The Florida Bar all disciplinary matters, reserving only a right of appeal to that body.

The question of what to do with the multiplicity of trial courts has been particularly perplexing. A complicating factor has been the disparity of size between the large and small counties. A trial court system suitable for the needs of half a million people does not readily adapt itself to a county of five thousand simply by the reduction in the number of judges. One plan under consideration would result in two trial courts, Circuit Courts and County Courts of Record. (A circuit could be comprised of one or more counties, thus preserving the existing situation.) The Circuit Courts could have jurisdiction of capital cases, civil cases involving amounts over $5,000 or a similar amount, and equity litigation. The County Courts of Record, with at least one judge in each county, could handle probate matters, juvenile cases, all criminal cases except capital, civil cases under $5,000, and family matters concurrently with the Circuit Court. Magistrates could replace the present justices of the peace. These officials could have limited trial jurisdiction and act as committing magistrates. However, as finally submitted to the legislature, the previously described tangle of trial courts was left unchanged; hence, the proposed new judicial article contains the new features described above interwoven with the old system, and the entire article has been rewritten in an orderly fashion. The trial courts are presently under study, and the future may yet find us with a simple, efficient system readily understood by the man on the street.

The American Bar or Missouri plan for the selection and tenure of judges was also recommended to the legislature. As submitted by the Council, it would have been applicable to the appellate level and to the circuit level on a local option basis. Members of the Bar are generally familiar with this plan and variations of it, so discussion will not be attempted. Let it suffice to say that the plan was met with the usual epithets of un-Americanism and so forth and failed to receive legislative sanction, even though it was brought out that the vast majority of judges from the circuit level up rarely, if ever, had opposition, and that at least 99 per cent gained their judicial office via gubernatorial appointment. In the history of state government in Florida, only two justices of the Supreme Court initially acquired their office by election to that position. Another proposal discussed was the placing of all criminal prosecution under one officer, the state's attorney. (Florida has one state's attorney for each circuit.) This proposal would eliminate the office of county prosecutor or solicitor. Last, but not least, one idea examined related to a central clerk in each county who would take over the duties of the several clerks where more than one is in existence. This would result in reducing administrative cost and would eliminate confusion in filing court papers, and will probably receive further study.

What is the outlook for judicial reform? Deliberations of the Council have received favorable comment in the press, and group support has been offered by the Citizens' Constitution Committee and The Florida Bar. The present governor, a member of the Bar, sponsored the bill creating the Council in the 1953 legislature and advocated a new judicial article in his message to the legislature last spring. The highest hurdle came with final passage of the joint resolution in the legislature, but the race is not yet won. Explanation and public hearings could aid public understanding and help to overcome voter apathy, and organized Bar support will mean a great deal to the Council's effort.

Pursuant to the canons, attorneys and judges in Florida are seeking to fulfill the admonition that we "strive at all times . . . to improve not only the law but the administration of justice".[16]

14. First Annual Report of the Judicial Council, page 15.
15. Chapter 29796, Laws of Florida, 1955.
16. Canon 29, Canons of Professional Ethics of the American Bar Association, adopted by the Supreme Court of Florida on January 27, 1941.

# Books for Lawyers

THE PRESIDENCY TODAY. *By Edward S. Corwin and Louis W. Koenig. New York: New York University Press. 1956. $3.00.*

In this small, timely and provocative volume, the authors rapidly review the Presidency in perspective from Washington's time to the present day, with stress on the historical growth of presidential powers, especially in war time—powers which first burgeoned large in Lincoln's administration and came to a climax in that of the second Roosevelt and in the Korean "police action" of Mr. Truman. They observe with Norman J. Small that "Nothing is more evident in the history of the Presidency than the steady accumulation of power by that office."

In the area of presidential prerogative, based on the conduct of the office by the second Roosevelt, they tend to over-enlarge the "commander-in-chief" area without consideration of such decisions as *Ex parte Quirin,* 317 U.S. 1, 25-6, 29 (1942), and *Ex parte Milligan,* 4 Wall. 2, 139 (1866), which appear to limit the "commander-in-chief" function to "the command of the armed forces and the conduct of campaigns", except as Congress may otherwise provide under the "necessary and proper clause". As pointed out in the *Quirin* case, the commander-in-chief area is subject to reasonable regulation by Congress under the "necessary and proper clause", the scope of which with respect to the other two departments, the Presidency and the courts, is not always remembered. See *Constitution of the United States of America.* (Annotated 1952. Government Printing Office.) Edward S. Corwin, Editor. Page 307; U. S. Senate Hearings, S.J. Res. 1, April-May, 1955, page 600.

While criticising the fifty-destroyer deal just prior to World War II as violative of existing statutes, they appear dissatisfied with the *Steel Seizure Case,* largely, however, as being inconsistent with prior precedents of presidential seizure of power in emergencies. They do not advert to the basic theory of the Court's decision as perhaps best expressed in the concurring opinion of Mr. Justice Jackson where after pointing out that "much" of what is said in *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304 (1936) (partly relied on by the authors), is "dictum", he continued:

> It was intimated that the President might act [in external affairs] without congressional authority, but not that he might act contrary to an Act of Congress.

They speak of a "presidential emergency power to adopt *temporary remedial legislation* [executive orders] when Congress has been, in the judgment of the President, remiss". And they say this notwithstanding Article I of the Constitution vests "all legislative power" in Congress, which was the basis of the *Steel Seizure* decision, and notwithstanding the Court has repeatedly said in other cases that the President cannot "make laws". The nullity of the executive order in the *Steel Seizure Case* ought to settle this point. On this phase they conclude: "The best escape from presidential autocracy in the age we inhabit, is not, in short, judicial review, which can supply only a vacuum [sic?], but timely legislation."

The authors mildly query the claimed enlargement by treaty of the power of the President to make war, without declaration by Congress, in case of an attack on one of our treaty allies in Europe or Asia, and discuss also the great inroads on the constitutional treaty role of the Senate by the wide use of executive agreements, published and unpublished.

They sympathetically analyse the problem of presidential confidences and refusal to furnish executive records and papers to Congress.

They wisely suggest "a closer working relationship between the President and Congress" and to this end comment on the recurrent proposal to give cabinet members seats in Congress. For themselves they urge consideration of a new type of cabinet consisting of legislative leaders and department heads with seats in Congress.

One of the currently timely discussions is the excellent defense of the present electoral college system as against various proposed reforms which they convincingly establish would have the practical and highly detrimental effect of irreparably damaging the two-party system, of greatly increasing the danger of electing minority presidents, and of actually destroying the device invented by the Founding Fathers to minimize popular emotional influence of the moment in the selection of the President.

They forcefully condemn the idea of a presidential primary as being ineffective, misleading, often unattractive to the bulk of the voters, characterized by uneven participation of candidates who tend to handpick their battleground, impossible for conscientious persons holding public office with current duties to perform, inordinately expensive, prohibitive for many competent but inadequately financed candidates—indeed, an anti-democratic instead of a democratic device, which would generally limit candidates to the few who could command big campaign money, while at the same time having a disastrous effect on party cohesion. (Note statement of Adlai Stevenson, March 28, 1956). They make a convincing case that presidential primaries should be abolished.

With the illnesses of Presidents

Wilson, Roosevelt and Eisenhower as the take-off point, the writers stress the increasing importance of the Vice Presidency. They quote President Eisenhower in 1952 as saying that the "National conventions should choose the Vice President primarily for his acceptability as a close working partner", and that "a presidential nominee should step aside if the convention did not abide by his preferences".

The authors conclude, as they began in the preface, with the assertion that "methods must be devised for making the national legislative powers more readily available when need for important action arises", and, if not at hand, the need "will be filled by the power that is at hand at all times, that of the President".

The contents of this timely book deserve the attention of every American and should be a "must" for every member of Congress. Congress could well give immediate heed to the problems and suggestions which it puts forward.

ALFRED J. SCHWEPPE
Seattle, Washington

THE SUPREME COURT SPEAKS. *By Jerre S. Williams. Austin: University of Texas Press. 1956. $5.95. Pages 465.*

Professor Jerre S. Williams of the University of Texas Law School has performed a noteworthy service to the Bench and Bar in his *The Supreme Court Speaks,* very recently published by the University of Texas Press.

Just under forty years of age, this gifted writer and talented lawyer will deserve the appreciation and gratitude of all those who would refresh their memories of the landmark opinions of the "supremest Supreme Court in the world", or who would observe for the first time a panorama of the part played by the Court in sustaining its own power while strengthening the stakes and lengthening the stays of the Federal Constitution.

The author succeeds in making his work more interesting by prefacing each of the great decisions by a biographical sketch of the Justice who wrote the opinion of the Court and a brief résumé of the background of the case. These sketches are excellent and whet the appetite of the reader to devour the decision.

The entire opinions are not given in every case, but the determinative pronouncements are presented, and, in many instances, attention is invited to the style of writing displayed by the Justices, a rather intriguing sidelight on the literary qualifications of the great lights of the Court.

The treatise divides the history of the Court into six eras, beginning with "John Marshall, Architect of the Federal System", and coursing through "The Civil War and Its Aftermath", "The Era of Holmes", "The Hughes Court", and ending with "The Modern Supreme Court".

The discussion of each decision is introduced by the key sentence or *bon mot* of the opinion, and in the foreword of the volume is a brief description of the routine of the Court today. There is a crisp epilogue, too, followed by the Constitution of the United States with all its amendments, good and bad, and a list of all the Justices, with dates of births and deaths and lengths of service.

Worshippers of the august body may not find some of their favorite opinions quoted, but, with few exceptions, the decisions which have left their indelible impress on the fabric of our form of government are included, and, as "The Supreme Court Speaks", we realize the "awesome responsibility" involved in every momentous conclusion, the necessity for the most cogent and convincing arguments in support, and the exceeding importance of preserving the balance of powers between the nation and the states without destroying any of the basic freedoms which have made our country so well known as the land of liberty and justice.

While lawyers reserve their inalienable right to "retire to the tavern and 'cuss' the court" after every unfavorable decision, they, primarily and essentially, are the guardians of the inviolability of our judicial tribunals, and it is the high privilege of the Bar to make certain first that the decisions of our courts are sound and true and then that the reactions of the public to judicially declared law are not marked by prejudice or misunderstanding, for it is often the people's views of the decisions which make history.

Mr. Williams' book will return us to active duty in the sentry box.

WALTER CHANDLER
Memphis, Tennessee

BROTHERS IN LAW. *By Henry Cecil. New York: Harper & Brothers. 1955. $3.50. Pages 275.*

Utilizing the entertaining vehicle offered by this *quasi*-novel, the reader vicariously experiences the multifarious adventures, and, alas, the misadventures, of a neophyte embarking upon his career at the English Bar. The plausible plot illustrates the impossibility of segregating a barrister's life into airtight compartments conveniently designated office hours and off-hours. Devotion to family, profession and friends interact with a novel's indispensable *amour,* all delightfully presented in a humorous vein.

Couched in fast-reading, journalistic style, the book appears unequivocally slanted to gain the favor of an American audience. Although the author steps dexterously in the light-footed treads of Gilbert and Sullivan, his work can not categorically be classified as light reading. The chuckles of merriment are interspersed with delectable morsels of information. Mr. Cecil's volume renders inordinately palpable, facts of comparative law, not customarily so readily digestible.

As the protagonist, Roger Thursby, advances in his new environment, *i.e.,* the school of hard knocks, he encounters many bumps and bruises. In step with this jet-propelled age he sails straight away into litigation. This is in marked contrast to Dickens' Mr. Phunkey of

*Pickwick Papers'* renown who, eight years subsequent to his call to the Bar, served his first client. Historic Old Bailey is visited several times in connection with criminal matters. And then an interview with a prospective divorcee who crosses and recrosses her shapely legs in discussing her discretion statement gives young Roger some trying moments. Legal anecdotes are liberally dispersed throughout and are woven in perfect proportion to preclude any loss of interest by the reader.

Adjunct to the main theme are numerous enlightening excursions into subjects apropos the practical aspects of English justice. A vivid character study presents the typical law clerk, who is so unique that he practically qualifies as a sub-species of Englishman. The idiosyncrasies of different judges regarding decorum and attitude in dispensing justice are subjected to scrutiny of a facetious nature. An insight is also afforded into the function of the formal dinners and various manipulations of the Inns of Court with the concomitant protocol observed by the barristers' social hierarchy. Coupled with this is a revelation of the almost imperceptible bridges spanning the gulf segregating the solicitor from his elevated complement, the barrister.

Since Henry Cecil is undoubtedly the pseudonym for some elevated personage in English legal circles, a genuine feeling of authenticity permeates the book. If you seek a delightful presentation of the *modus operandi* of our brothers across the pond, *Brothers in Law* will manifestly satisfy all desiderata.

LEO E. LLOYD
Timonium, Maryland

YOU MAY TAKE THE WITNESS. *By Clinton Gidding Brown. Austin: University of Texas Press. 1955. $3.95. Pages 223.*

Rough and tumble trial tactics and experiences of a successful trial attorney representing defendants in personal injury cases make up the principal theme of the author. But it is enlivened with so much human nature and understanding, and so vividly describes the background of the incidents and the reaction and emotions of the characters portrayed that the reading is much like fiction, and one finds the book hard to lay aside once it is begun.

So realistic is the book that the reader understands the reason for each step in the procedure of each trial and experience portrayed, and seems to live with the author the dramatic incidents that attend so many hard-fought and interesting trials and contests. The author points out and analyzes the subtle effect on jurors of many things a trial lawyer may well consider, such as the lawyer's personal attire and personal habits.

Though seemingly built upon and in conclusion quoting a letter of advice to his son just starting the practice of law, the book describes the trials of many interesting cases, not the least of which was the famous "Brinkley Case" which involved the libel suit against Doctor Fishbein, brought by Dr. Brinkley who has become famous for using goat glands in attempting to rejuvenate the sexual ability of old men.

Firmly convinced that the right of trial by jury is the greatest thing in the Constitution, the author repeatedly warns that purity in selection of a jury must be safe-guarded (preferably by use of the "wheel" without intervention of a jury commission), and that cardinal principles for the trial lawyer are to "be himself" and treat the jury as decent, honorable and intelligent men.

While you may not agree with author Brown's deep-seated prejudice against "ambulance chasers", and their "boosters"; or agree with the tactics he believed justified in order to "fight fire with fire"; or have the same gentle affection and praise for "claim agents" and their tactics; or go along with the intimation that defendants' representatives are entitled to make an investigation before the plaintiff starts protecting his rights, nevertheless, the case author Brown makes for these propositions is stirring and provides very provocative reading.

Certainly you must agree with the author that the law provides a very "jealous mistress", requiring much hard work, but that for the lawyer who is earnest and honest, the practice provides many rich rewards (other than monetary gain), and full opportunity for exercise and expression of his talents and capabilities in preserving and safeguarding the lives, liberty, property, success and happiness of his clients, whether rich or poor.

*You May Take the Witness* will well reward your reading, particularly if you love the law and trial work.

EDWIN LUECKE
Wichita Falls, Texas

THE LOYAL AND THE DISLOYAL. *By Morton Grodzins. Chicago: The University of Chicago Press. 1956. $4.00. Pages 320.*

Man, complex being that he is, requires many things to make life tolerable on this planet. Not the least of these is a devotion to certain concepts which seem to sweep him into the mainstream of human existence—past, present and future. Thus, justice, truth, beauty, love, loyalty become word symbols of his need for more than bread alone. But these words are semantic mother hubbards that conceal far more than they reveal; loosely applied they result in fuzzy thinking and can be downright dangerous. Through the centuries, thinking men have realized this danger and have tried to find the essence of the broad concept. Professor Grodzins, Chairman of the Department of Political Science, University of Chicago, is the latest to essay this difficult task. He asks, "What is loyalty; what is disloyalty?"

If one is looking for a brief and easy definition of national loyalty he will not find it here. As the author states, "The whole book is in one sense that definition." If, however, one is seeking light for a murky area of human activity he will be delighted with this brilliant analy-

sis of the loyal and the disloyal. If, as the author contends, "no man is wholly patriot or wholly traitor, but every man is a little of each", then it behooves "every man" to seek understanding of the nature of loyalty. Indeed my principal criticism of Professor Grodzins is that he has written a rather lengthy book that may not be widely read; his analysis is so penetrating that I wish he had written it in essay form so that it might be read by the millions. Perhaps he will yet do so.

Disloyalty, like sin, has no friends. The author begins with the story of the thief who stole a suitcase in Grand Central Station only to discover it was full of secret military information. Indignantly he called the F.B.I. to confess, "I've checked it in one of the public lockers and I'm mailing you the key. I'm a thief. But I'm a loyal American thief." Similar stories are sprinkled liberally throughout the book. The peculiar idiom of the social scientist is missing and this is a distinct gain for the general reader.

The book divides into five major parts, plus forty-five pages of scholarly notes. Like Gibbon, Grodzins has hidden some of his choicest gems in the fine print, *e.g.*, "In the long run, the radicalism of the aged may become a national problem of greater importance than the delinquency of youth." The five parts suggest the scope of the book: (1) most men are patriots; (2) democratic and totalitarian national loyalty; (3) the loyalty of disloyalty; (4) where are the disloyal; and (5) some policy conclusions. A brief look at each of these parts will put the author's ideas in a nutshell; nothing can keep them there.

Of course most men are patriots, but what makes national loyalty the supreme loyalty? The complex answer includes: satisfaction in being part of a larger cause; the preference for the familiar over the unfamiliar; the merging of individual and group loyalties into the mass national loyalty; the great weight of social inertia and indolence that keeps most men in passive acceptance of what is; and the stigma attached to disloyalty. Fortunately, the scales are heavily weighted for loyalty and only the rare individual climbs on the light side.

Loyalty in a democratic state is composed of a welter of smaller loyalties—loyalty to the individual, the family, the political party, the church, the union, the business, the club, etc. Many of these loyalties are ambiguous and even contradictory; "a lady will keep her lover waiting until she finishes ironing her husband's shirts". But since all of the groups are usually loyal to the nation, the combined result is national loyalty. In a dictatorship, the ties are directly to the state and this is the greatest difference between the two loyalties. Since the latter is direct it is easier to manipulate, but it may be harder to maintain because it is not sustained by lesser loyalties.

The author is at his best as he analyzes the loyalty of disloyalty. He has plowed this field before in his book, *Americans Betrayed: Politics and the Japanese Evacuation,* but as he describes the nightmare of the only group in American history to be forced to declare themselves loyal—or disloyal—to the United States, the pathology of disloyalty is apparent. The author concludes, "Here we find those most attached and most adjusted to American ways declaring themselves disloyal because they deeply felt that the evacuation was an affront to America as they conceived it should be. They were disloyal Americans because of their Americanism."

"All of us are potential traitors", but some social groups are more likely than others to contain the seeds of treason. Moreover, these groups can be defined by techniques of social research that are now being developed. This is highly significant because it means that with proper study a nation could spot potential areas of disloyalty both among its own citizens and those of a foreign power.

Not surprisingly, the author asks some searching questions about national loyalty investigations and their consequences. The answers are not yet fully available but it is safe to conclude that future investigators would profit by a careful reading of this thoughtful book. One need not agree with all of Professor Grodzins' conclusions in order to accept his premise that, "Allegiance to nation, once subjected to the heat of critical appraisal, is stronger, more meaningful, and more socially useful than allegiance accepted on the basis of tradition, or ignorance, or faith, or fear."

JOHN E. CRIBBET
University of Illinois
Urbana, Illinois

## FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY. *By Joel B. Dirlam and Alfred S. Kahn. Ithaca, New York: Cornell University Press. 1954. $4.50. Pages 288.*

This book is an interesting, well written and provocative review of recent antitrust literature, decisions and economic philosophy, with a vigorous defense of both the enforcement of, and the decisions under, what the authors call the "New" Sherman Act.

The book merits reading by anyone interested in antitrust law. The "experts" will find it a generally (no one can be expected to find it a wholly) sound approach to the maintenance of a competitive economy; non-experts will find that it gives a good bird's-eye view of antitrust, including criticisms of many other leading writers' works on the subject, analyses of most recent Sherman (and many Clayton) Act cases and an economic study of antitrust enforcement policy.

The book opens with a discussion promptly leading the reader to conclude that the authors could well have omitted the word "fair" from the title. They discuss "workable competition", effective competition", "monopolistic competition", "pure competition", "perfect competition", "imperfect competition", "countervailing power", etc., until they make clear that "competition" can mean

many things to many people in different settings. And to the extent that the word "fair" has acquired an antitrust meaning in the context of so-called "fair trade", it does not have that meaning here for the authors generally favor a vigorously competitive economy in the interest of the consuming public.

The opening paragraphs of the book discuss the underlying economic theory and, to a greater or lesser extent, are critical of most of the recent writing in antitrust literature. They answer effectively much of the recent criticism that antitrust enforcement has been too vigorous and is an impediment to our expanding dynamic economy. This in part is made possible by their reference to criticism most easily answered, while they fail to mention much of the criticism not so readily answerable.

While the authors are critical of most of the literature to which they refer, it is also likely that no antitrust authority will wholly agree with their views.

Perhaps the most justified criticism of the book is that the authors seek to cover too much area in a book of modest length. But their general approach to antitrust problems is sound and they are generally consistent in their philosophy.

The authors approve the decisions in all the recent Sherman Act cases which they review, and most of them are reviewed. Discussed in some detail are the *Alcoa, American Tobacco* and *A. & P.* cases as well as the pending *A. T. & T.* case. The authors are, however, somewhat critical of what they describe as the reluctance of the courts to decree divestiture in more cases. They seem to feel that breaking A. & P. up into several chains of retail stores would even be better for A. & P. On the other hand they fully approve of the economic propriety of integration, to the extent of urging that "freedom of entry" must include the right of a businessman to integrate. They appear critical of integration in industries, such as aluminum, where raw material suppliers also fabricate and compete as fabricators with customers to whom they sell the basic commodity.

Throughout the book, but particularly in the Sherman Act cases, the authors limit their consideration of court decisions as precedents applicable only to the facts in the particular cases. They wholly approve a decision when, on its own facts as they describe them, they conclude the defendant violated sound antitrust law. On the other hand some critics of those decisions would not question the innocence or guilt of the particular defendant, but rather have questioned the judicial reasoning by which the adjudication was reached.

The authors' treatment of exclusive dealing—a middle of the road approach—should be helpful to lawyers considering exclusive dealing problems. They point out that exclusive dealing can be an instrument of competition as well as in restraint of competition. They make a strong case for permissive exclusive dealing at the retail level in industries where suppliers are plentiful and can be of financial help to a retailer whom they are assured will push their product.

In Sherman and Clayton Act cases their interpretation and analysis of court decisions frequently make the opinion seem sounder than I had previously thought the opinion to be. Perhaps this is so because they marshal all the facts supporting their conclusion so well and are not troubled by the dicta or "irrelevant" facts.

Some of their proposals will no doubt surprise readers who in general will probably agree that it is a good book (including myself). For example, they propose that it might be desirable to limit the amount of advertising that a corporation can do to a percentage of gross revenues. While this is suggested with reference to the cigarette industry as a means of restraining the "big three", a strong argument can be made that such a proposal will also restrain small firms from attempting to grow just as much as it will keep the big firms from growing bigger. And it would be necessary to have virtually a different percentage limitation for every industry because the percentage of their sales that cigarette companies spend on advertising is minor compared to, say, cosmetics.

Their discussion of the basing point cases is a most objective interpretation of the applicable decisions and the economic desirability of competitive freight absorption. They suggest, however, that one effect of the decision has been the construction of new cement plants in deficit production areas. Others would argue that a more than doubling of cement demand in the past ten years, plus substantial increases in freight rates, more directly accounts for these new plant locations.

The authors' discussion of price discrimination is in keeping with their vigorous defense of Sherman Act philosophy expressed earlier in their book. Their vigorous defense of Sherman Act objectives makes understandable their lukewarm enthusiasm for the Robinson-Patman Act. Seeking to cover the entire Act in one chapter, their discussion is necessarily sketchy.

Their treatment of seller competition is mainly in terms of A. & P's practices, but the *A. & P.* case was brought under the Sherman Act (although the Robinson-Patman Act was directed almost wholly at A. & P.). Their treatment of injury to competition, functional pricing and meeting competition, the three most troublesome issues in buyer competition cases, makes a worthwhile contribution to the literature in this field. Their views on these subjects are generally sound, recognizing that there can be no certain answers under an uncertain statute, but discuss the issues in only the broadest terms.

The second part of their book is devoted to an economic analysis of the questions previously considered from a legal viewpoint. For myself, I always prefer a lawyer's, or a law professor's, discussion about economics to an economist's discussion

of the law. The book is perhaps less readable than it would have been if their economic discussion had been combined with their legal analysis of recent cases, but their economic views are not extreme and are again largely sound.

Lastly the book contains a chapter entitled "Proposed Revisions of Antitrust". This is more a criticism of other suggested revisions than a statement of their own proposals.

As in their earlier discussion of the "new" criticism of the "New" Sherman Act, the authors hold up David Lilienthal (especially his article "Big Business") as an example of this "new" criticism of the antitrust laws. But I would hardly consider Lilienthal's writings as a fair example of current criticism. True, his articles were popular in many quarters, but I doubt that they can fairly be said to reflect current criticism. Certainly the most frequently made current criticism is the "damned if you do and damned if you don't" difficulties arising from conflicts in antitrust, which the authors do not consider.

The authors then discuss the desires of businessmen for "certainty" in the antitrust laws. They paradoxically demonstrate that certainty is not possible except through a long list *of per se* rules, which they wisely argue against.

They are critical of *the* rule of reason, argued for by Professor Oppenheim in his *Michigan Law Review* article, but I think that they contend that Professor Oppenheim's rule of reason is much broader than he does, for his article does not urge an economic appraisal of good versus bad in every antitrust situation as the authors suggest. For example, Professor Oppenheim's article does not disagree with the result in the *Trenton Potteries* case as an unreasonable *per se* price fixing agreement among competitors to control the market price. Hence, he cannot be charged with the thought that this case was "one of the first steps in an erring interpretation".

They reject the rule of reason in cases of "substantive conspiracies in restraint of competition". Of course a book could be written on what is a substantive conspiracy in restraint of competition. The Dirlam-Kahn theme is *a* rule of reason to determine what economic situations are bad *per se* and which should be measured by *a* rule of reason.

In summary, the book is most interesting and helpful reading. Lawyers will find themselves much more nearly in agreement with what is said in this book than with similar books written by many professors of economics. Professor Kahn was a dissenter to the Report of the Attorney General's National Committee To Study the Antitrust Laws. I assume that a majority of that Committee would dissent from his book; but I think it is surprising to find how limited and narrow is the area of this disagreement.

WILLIAM SIMON
Washington, D. C.

JEFFERSON DAVIS, AMERICAN PATRIOT, 1808-61. *By Hudson Strode. New York: Harcourt, Brace and Company, 1955. $6.75. Pages 452.*

Hudson Strode, Professor of English at the University of Alabama, tells why he resolved to write this illuminating story of the life of Jefferson Davis. The book is the first of two volumes on the life of this famous American. Professor Strode writes: "A fortnight after my mother-in-law's death on June 3, 1951—coincidentally Jefferson Davis' birthday—on going through her scrapbook [in Montgomery, Alabama.] and a suitcase of letters and various odds and ends about him, I came across a contemporary clipping, giving a vivid account of his ironing at Fortress Monroe, where he was thrown to the stone floor and held down by four soldiers while a blacksmith riveted heavy shackles on his ankles. My indignation was aroused, and at that moment—at a quarter to four on the afternoon of June 17—I determined to seek the whole truth about this man and write his life in the light of what I discovered."

And Professor Strode, famed for his works on travel and history, began—gained access to many family letters never before exposed, and, in simple, sometimes epical style, has unfolded the character and abilities of one of history's most misunderstood and wrongfully criticized leaders.

Born June 3, 1808, near Hopkinsville, Kentucky—close by Lincoln's birthplace—he came of sturdy stock. His father, Samuel Emory Davis, fought in the Revolution. The family had moved from Georgia to Kentucky. There, alone in her backwoods kitchen, Davis' mother, Jane, once outwitted a desperado. Throughout his life, Jefferson Davis was true to the stamina of his forebears.

He was named for President Thomas Jefferson, whom the father and later the son greatly admired. The family moved to Mississippi in the Delta country. The Baptist father sent the boy to St. Thomas' boarding school, in Kentucky, operated by Dominican monks. He entered Jefferson College near his sister Anna's place in West Feliciana Parish, Louisiana, and later Jefferson College in Mississippi. At 13, he attended Transylvania University at Lexington, Kentucky, his attendance made possible by the opulence of his favorite brother, Joseph. He became an omnivorous reader. While in Kentucky, he accepted an appointment to West Point—his commission was prepared by his later idol, John C. Calhoun, then Secretary of War.

Davis entered West Point at 16. He liked best of all men at the military academy Robert Anderson, whom destiny later selected to command Fort Sumter!

The career of Jefferson Davis at West Point was scarred by disciplinary infractions—one, a refusal to tell on his roommate, but there was no infraction involving integrity. He was popular with the students.

He graduated June 12, 1828, twenty-third in his class. Professor Strode said that Davis' West Point training "gave him a sovereign self-control". A famous classmate commended "his manly bearing, his

heightened and lofty character".

When nearly 21 years old he was sent to Fort Crawford, hard by Prairie du Chien in Wisconsin. Colonel—later President—Zachary Taylor commanded. Davis gave a distinguished account of himself in the Black Hawk War. His treatment of the captured Black Hawk, says Strode, was "with all the consideration and courtesy due a fallen war lord".

On his return to Fort Crawford from his mission, he met Sarah Knox Taylor, daughter of Colonel Taylor, whom Davis later married. She contracted malaria and died at 21, three months after marriage.

He later soldiered in Arkansas and Indian territory. His career was gallant and noteworthy. After seven years' service, he resigned to become a Mississippi planter.

Davis' first political effort, his race to win a seat in the Mississippi legislature, failed. He was defeated by the great orator, Seargent S. Prentiss, a Whig. (This reviewer has been to his mossy grave near Natchez.)

In 1845—within two years after his defeat—he was elected to Congress. He sat with John Quincy Adams, who said of Davis: "That young man, gentlemen, is no ordinary man. Mind me. He will make his mark yet. He will go far."

When the Mexican War came, Davis volunteered for service and organized the First Mississippi Regiment. Throughout his military service, he had James Pemberton, body servant, always with him. Davis' treatment of this Negro slave was a tribute to human understanding.

Davis' second wife was Varina Howell, who was mother of his four sons and two daughters. At her behest, he got leave to visit her because of her health. Davis' Mexican service was brilliant and distinguished. He was in the successful Battle of Monterey and was a hero at Buena Vista. He declined appointment as brigadier general. He was badly wounded in action.

On his return to Mississippi, he was appointed to the United States Senate at age 39. The historian, Prescott, said that Senator Davis was "the most accomplished" of the Senate's leaders. While not of the party of President Taylor, Davis enjoyed his confidence and affection. He was chairman of the Committee on Naval Affairs.

These projects he sponsored:

The acquisition or the liberation of Cuba; the construction of four railroad lines to the Pacific; the development of factories and industries in the South; free trade with other countries. (Actual surveys for the railroad lines were made by the Government. Through territorial acquisition, the Southern Pacific was actually made possible. This railroad, the Northern Pacific, the Union Pacific and the Kansas Pacific follow lines corresponding to surveys made by the War Department when Davis was its head).

He was re-elected to the Senate and gave up his office to fight unsuccessfully for principle. He was defeated for governor. Malaria and ensuing eye trouble kept him from the campaign. He had opposed the gospel of nullification.

He was a conspicuous and devoted friend of President Franklin Pierce, who four times offered Davis the portfolio of Secretary of War. Davis finally accepted and served with distinction.

President Pierce's attachment for the Mississippian was manifest when Mrs. Davis was ill. Pierce, President of the United States, braved great snow-drifts to call on her afoot.

Throughout his public career, Jefferson Davis suffered from recurring ill health, yet he went from one accomplishment to another. Horace Greeley said of him: "Mr. Davis is unquestionably the foremost man of the South today."

After his term as Secretary of War, Davis was again elected United States Senator. His program for the Army was constructive. He built the frame-work of a military establishment, upon which the great armies under Grant and Sherman were to crush the Confederacy.

In the historic and trying days when the Dred Scott decision aroused the North, when the Kansas-Nebraska bill, the Missouri Compromise, the Wilmot Proviso and "squatter sovereignty" were to fan the flames of bitterness, Jefferson Davis was in the midst of it all. He believed in a strict construction of the Constitution—the right of property in slaves (though his treatment of slaves was most humane). He believed in the sovereignty of the states—and their right to secede, as Massachusetts had once threatened—when states' rights were impinged upon. Lincoln himself declared for this doctrine in 1848.

But when Mississippi seceded, Davis declared:

> Is there wisdom, is there patriotism in the land? If so, easy must be the solution of this question. If not, then Mississippi's gallant sons will stand like a wall of fire around their State; and I go hence, not in hostility to you, but in love and allegiance, to take my place among her sons.

He accepted a commission of major general of Mississippi's armed forces. He wanted to fight, but the convention in Montgomery, Alabama, unanimously chose him President of the Confederacy. In the inaugural parade in which he rode, the band played Dixie, which had for the first time been orchestrated for a band. Two years before, Dan Emmett, son of an abolitionist, wrote it for his minstrel show.

Professor Strode brings down the curtain on the first act of a great American drama. It was a period of Jefferson Davis' life little remembered, but often misunderstood. As the fiery William L. Yancey, of Alabama, declared as he placed his hand on the shoulder of Jefferson Davis, standing in the old Exchange Hotel in Montgomery: "The man and the hour have met."

Professor Strode has made a major contribution to the historical record of the brave deeds of an "American Patriot". The book is beautifully illustrated with rare portraits of the Davis family. Every American, whether his ancestors fought under Lee or Grant, Farragut or Semmes, should read this well-told biography.

HERBERT U. FEIBELMAN
Miami, Florida

SISTEMA SOVETSKOI IUSTITSII V SKHEMAKH (Soviet System of Justice in Diagrams). *By N. S. Semenov. Munich: Institute for the Study of the History and Culture of the U.S.S.R. 1953. Pages 28. Available in the United States on microfilm from the Library of Congress.*

The structure of the Soviet system of "justice" is described with the aid of several diagrams which show the legal and political organs in this system and how they stand in relation to one another, *i.e.,* those that touch, those that control and those that depend. Diagrams of the flow of authority—supervision, subordination, permanent contact, political guidance, etc.—disclose how a despotic legal system operates in theory. Statements by persons who have lived under that system, however, disclose how it operates in practice.

Mr. Semenov's monograph describes the Soviet system in operation as follows:

> The Soviet judicial system . . . is only a part of the huge punitive apparatus of the communist dictatorship. In the USSR, "Justice" is being accomplished not only by law-courts—general and special ones—but also by boards, so-called *troikas,* i.e., three-man boards and administrative commissions [M.V.D.], whereby the number of persons repressed by the M.V.D. institutions greatly surpasses that of the persons convicted by law-courts.
>
> . . . The Soviet law-court organization, just as all other organs of the State system in the USSR, has two sides: the official one and the actual. The first (the official side) exists in order to demonstrate "on paper" the democratic character of Soviet justice and its independence from any outside influence. The second (the actual side) on the contrary proves that Soviet justice does not possess any independence and is fully subjugated to the Communist Party apparatus in all its instances from the highest to the lowest.

The coexistence side by side of a system of force and a system of law raises the question as to what extent the system of law is merely a "paper system" recited in lawbooks. Professor Harold J. Berman, at Harvard, has said: "To this question the scholars have been able to give no definitive answer, for the simple reason that without direct access to the Soviet Union, without free observation of Soviet conditions and free discussion with Soviet citizens, there can be no definitive answer. We are somewhat in the position of those who study the Roman law of the time of Justinian."[1]

Mr. Semenov's monograph contains eleven Diagrams of the political and legal organization of the Soviet system of "justice," *i.e.,*

1. Ministry of Justice of the U.S.S.R.
2. Ministry of Justice of a Single Union Republic and its Local Organs
3. Court of Justice and Prosecuting Magistracy of the U.S.S.R.
4. Supreme Court of the U.S.S.R.
5. Special Courts of the U.S.S.R.
6. The Judicial System of a Single Union Republic
7. The General Prosecuting Magistracy
8. The Prosecuting Magistracy of the Soviet Army
9. The Prosecuting Magistracy of Railroads
10. The Prosecuting Magistracy of a Single Union Republic and its Local Organs
11. The District Prosecutor

Each of these diagrams is accompanied by a short text which explains the flow of authority between the courts, the Party, and the Prosecuting Magistracy.

"Justice" in the Soviet Union is administered by the Supreme Court of the U.S.S.R., the Supreme Courts of the Union Republics, the Territorial and Provincial Courts, the Courts of the Autonomous Republics and Provinces, the District Courts, the Special Courts of the U.S.S.R. (created by decision of the Supreme Soviet), and the People's Courts. (*Constitution,* Article 102).

The enforcement of law is vested in the Prosecutor-General of the U.S.S.R., who is appointed by the Supreme Soviet for a term of seven years. (*Constitution,* Art. 114) His jurisdiction extends over the whole of the Soviet Union to see that the laws are faithfully obeyed and vigorously enforced.

The Communist Party plays a significant role in the administration of "justice" in the Soviet Union. Party organs and committees operate on the courts and the Prosecuting Magistracy at all levels, from the highest to the lowest, supplying political guidance and making formal assignments to the courts.[2]

The highest judicial organ in the Soviet system is the Supreme Court of the U.S.S.R. Judges of the court are elected by the Supreme Soviet for a term of five years,[3] and the court is charged with the supervision of all the judicial organs of the U.S.S.R. and of the Union Republics (*Constitution,* Articles 104-105). The work of the court is carried on through six *Boards* or "Collegia" which hear cases coming within their jurisdiction. The Board for Disciplinary Matters was created as recently as June, 1948.

The lowest judicial organ in the Soviet system is the People's Court, consisting of one professional judge and two laymen or *people's assessors.* Cases are decided by a majority vote. (Law of August 16, 1938).

In theory, the *people's assessors* are members of the court with the same rights as the people's judge, but in practice they play only a small role in the decision of a case; they are usually ignorant of even the most elementary rules or principles of the law.

Before hearing a case, the people's court confirms the indictment submitted by the district prosecutor. If the court disagrees with the indictment, it may either discontinue the

1. Boris A. Konstantinovsky, SOVIET LAW IN ACTION (Cambridge, 1953), page v. Edited with an Introduction by Harold J. Berman.

2. Professor Berman has observed that "the Soviet System—both the political and the legal system—is designed to minimize political and administrative pressures upon the judiciary at the lower levels, and to maximize such pressures at the higher levels where political or administrative interests are seriously involved." Harold J. Berman and Miroslav Kerner, SOVIET MILITARY LAW AND ADMINISTRATION (Cambridge, 1955) page 160.

3. Comprised of more than seventy members (who are jurists) and thirty-five people's *assessors* (who are laymen), the present Supreme Court of the U.S.S.R. was elected by the Supreme Soviet in March, 1951, for a term which expires in 1956. In February, 1955, the Supreme Soviet by special decree removed six judges from the Court and ordered the appointment of seven new judges in their places.

case or refer it back to the district prosecutor for further investigation.

The district prosecutor is appointed by the Prosecutor of the Union Republics with the approval of the Prosecutor-General of the U.S.S.R. He has permanent contact with, and receives political guidance from, the District Communist Party.

Normally there are two steps in the trial of a civil or criminal case in the Soviet Union: (1) the case is first tried in the People's Court; (2) on the motion of either one or both of the parties, the case is then heard on appeal by the next highest court, usually the Territorial Court.

In addition, the case may go on for *review* by the Supreme Court of the particular republic in which it arose, and again by the Supreme Court of the U.S.S.R. The sentences, judgments or orders of the Supreme Court of the U.S.S.R. may be reviewed at a special plenary sitting of the court, called for this purpose, consisting of the President of the Supreme Court, the Vice Presidents, and all the members of the *Boards*.

When a case is reviewed by the Supreme Court of a Union Republic or the Supreme Court of the U.S.S.R., the litigants are not allowed to attend the hearing and the procedure is not made public.

Strictly speaking, these *reviews* are not "appeals" but are in the nature of judicial "supervision" over the legal system. They are called *protests* and are initiated by the Union-Prosecutor or by the President of the Supreme Court of the Republic, in the case of reviews by the Supreme Courts of the Republics, and by the Prosecutor-General of the U.S.S.R. or by the President of the Supreme Court of the U.S.S.R., in the case of reviews by that body. *Protests* may also be initiated by a letter from the attorney of the defeated litigant setting forth the grounds for the review. There is a special section within the prosecuting magistracy to which a Soviet citizen may address a telegram of *protest* if he thinks he has been wrongfully arrested or convicted.

Mr. Semenov's monograph on *The Soviet System of Justice in Diagrams* is available in the United States on microfilm from the Library of Congress. The text is in Russian, but the appendix contains a single page "summary" in English, German and French.

JOHN C. HOGAN
Santa Monica, California

EUROPEAN AND COMPARATIVE GOVERNMENT. *Second Edition. By Robert G. Neumann. New York: McGraw-Hill Book Company, Inc. 1955. $6.50. Pages 818.*

In this age of specialization, it requires an informed reader to interpret the news. As the structure of government becomes more complex, the news which emanates from the agencies of government becomes more complex. An intelligent appraisal of contemporary world events demands a comparative understanding of political and governmental institutions. In his latest book, Professor Neumann has provided us with the source material to obtain this understanding.

There is a tendency among those who have passed the academic hurdles to label a book prepared primarily for students a "textbook". The imposition of this label relegates the book to obscurity, and the active professional is free to turn to less formalized reading pursuits. Professor Neumann's cogent and provocative style avoids the stereotyped "textbook" label, and his balanced treatment of the four major contemporary European powers provides interesting and informative reading.

According to the author, with the exception of the United States, the nations which have a profound influence on the rest of the world are to be found in Europe. For this reason, the first four sections of the book provide an incisive analysis of the governments of Great Britain, France, Germany and the Soviet Union. In addition to a functional description, the author incorporates information derived from his teaching experiences as Fulbright Professor at the Universities of Bordeaux and Strasbourg and visiting lecturer at the Universities of Madrid, Brussels, Munich, the Saar, and the Center for the Study of Foreign Affairs in Paris. Innumerable personal interviews with governmental leaders distinguish theory from practice, and the discussion of the new constitutions in France and Germany, the political repercussions of Stalin's demise, and the effects of nationalization in Britain add realism to a study of governmental institutions.

In the final section, the author attempts to synthesize the principles discussed within each governmental framework and to present a true comparative analysis of varying political and governmental organizations. Constitutional democracy is compared with dictatorship, and the doctrines of federalism and the separation of powers become living concepts.

The reader trained in the law may question the emphasis placed on the executive and legislative branches of government. As servants of the legal profession, we may have a tendency to exaggerate the influence and importance of law, justice and the judicial branch of government, but it is equally true that teachers of government may be guilty of placing inadequate emphasis on the contribution of the judiciary. Montesquieu said that "there is no liberty if the judiciary power be not separated from the legislative and executive". The system of checks and balances among the various branches is the heart of the American governmental structure. The idea of an independent and co-equal judiciary has been adopted in Austria and Germany. France and Italy have supreme administrative courts which effectively curtail the potential abuse of executive power. England has traditionally supported an independent judiciary, and even the Constitution of the U.S.S.R. pays lip-service to the doctrine that "judges are independent and subject only to the law". In one of the

concluding chapters, Professor Neumann states that " . . . the doctrine of the separation of powers is more important today than perhaps at any other time".

If the doctrine of the separation of powers is a vital, living concept, and if the independence of the judiciary is desired, it would appear that a sizable portion of an analysis of governmental structure should be devoted to law and justice. In Professor Neumann's book, twelve of the 186 pages devoted to Great Britain deal with law and justice, eighteen of 156 for France, seven of 146 for Germany, and six of 132 for the U.S.S.R. The concluding comparative section discusses the executive and legislative branches and the role of political parties, but there is no comparison of law and justice. Where the executive and legislative chapters include a discussion of leading personalities and a correlation between governmental structure and current events, the chapters on the judiciary present an impersonal analysis of court structure accompanied by an organizational chart which induces a hurried retreat to the next chapter.

It may be that the judiciary does not warrant additional coverage. It may be that the judiciary does not create in the same sense as the executive and legislative branches. The supposed isolation of the judiciary from the main stream of the political world may preclude a dynamic, living, expanded approach to law and justice in a discussion of government. If these assumptions are correct, how can we make the judicial branch attractive to the undergraduate student of government? Are we losing potential representatives of the judiciary because basic texts on government present the judicial function in a cold, abbreviated, fashion?

Since only 5 per cent of this excellent book has been devoted to law and justice, the preceding comments should not detract from the outstanding text which the author has assembled. *European and Comparative Government* is an important contribution to the development of political science, and every reader will derive a new understanding of governmental institutions in a changing world.

GLENN W. FERGUSON
Chicago, Illinois

LAW OFFICE MANAGEMENT. *Third Edition. By Dwight G. McCarty. New York: Prentice-Hall, Inc. 1955. $6.00. Pages xvii, 525.*

Following the analysis of Reginald Heber Smith of developments in the field of law office organization to 1956 as presented in the February issue of the JOURNAL (42 A.B.A.J. 145), it is especially appropriate to call to the attention of all lawyers who have anything to do with the management of any law office this new third edition of the pioneering book on the subject. The first edition of this book, published in 1926, and the second, published in 1940, covered much the same field as this third edition. In doing so, it succeeded in bringing to the attention of many lawyers solutions to problems of office detail which proved greatly to their benefit.

By virtue of the wide-spread interest in the subject matter developed in the last five or six years, the large number of addresses and panel discussions devoted to it at bar association meetings and articles that have appeared in journals of various bar associations, especially the excellent pamphlet published by the Committee on Continuing Legal Education of the American Law Institute, collaborating with the American Bar Association (Francis Price, *Personal and Business Conduct in the Practice of Law*, September, 1952; 133 South 36th Street, Philadelphia) much additional material has developed, and an entire rewriting of the earlier editions of this book was justified. With abundant citations to and quotations from these other source materials and with copious use of books and other material published in the fields of business management, this new edition makes of the book an exponent of system in law office detail which is worthy of study by every lawyer having to do with the management of a law office, whether he be a solo practitioner or a member of one of the largest "law factories".

Illustrations in this edition, containing, for example, photographs of modern office appliances, charts and forms, will be found suggestive by anyone comparing the procedures and routine in his own office. Believing as I do that details of office routine have developed as a matter of accretion and not of planning, I urge a re-analysis of such matters in every office from time to time. I would suggest that some months in advance, a season of the year most likely to be available for such an office survey be chosen, that a committee of two or three, including at least one richly experienced employee, be selected to study all suggestions to be found in this book and other literature on the subject, and in the light of all this, to recommend improvements in office procedure. After an opportunity for criticism of the recommendations of the committee by everyone in the office, to the end that all labor-saving improvements may be adopted and as simple and as clear-cut a routine as possible may be established, an office manual can then be prepared in which the procedures are written down for the guidance of everyone in the office. Such procedures of survey, routine in business management, are apparently employed infrequently in law offices. One cannot read this new edition of this book without appreciating the advantages of recurrent surveys of his own office procedures.

PAUL CARRINGTON
Dallas, Texas

# 1957 Annual Meeting:

# New York and London

▪ The Eightieth Annual Meeting of the American Bar Association will be held in New York, New York, and London, England, in July, 1957. The New York portion of the meeting will be held sometime during the week of July 7, the specific dates to be announced later when the schedule of steamship sailings is available. The London portion of the meeting will convene on July 24 with adjournment on July 30.

### Registration

Members desiring to attend the meeting should forward promptly to the RESERVATION DEPARTMENT, AMERICAN BAR ASSOCIATION, 1155 East 60th Street, Chicago 37, Illinois, the registration fee in the amount of $50.00. For those members who desire to attend only the New York portion of the meeting, the registration fee is $10.00. Upon receipt of the registration fee, a questionnaire will be forwarded to the member requesting certain information which should be supplied promptly.

### Transportation and Hotel Accommodations

The Association has designated the American Express Company and Thomas Cook & Son as its exclusive agents for the purpose of arranging for transportation and hotel accommodations in London. These agents will communicate directly with each member whose registration is accepted and will furnish information as to transportation and hotel accommodations, as well as an attractive choice of tours following the meeting. Because it is necessary, both from the standpoint of the American Bar Association and from the standpoint of our hosts in England, that an official list of registrations be maintained, **members are urged not to attempt private arrangements** which might result in their failing to be accredited for the meeting.

It is the earnest desire of those who have the responsibility for arranging this memorable meeting to afford every member who wishes to attend the opportunity to do so. It is necessary, however, to respect the limitations which must be imposed and which are hereafter explained. Compliance with the procedures which have been established to meet the problems involved will insure fair treatment for everyone.

### Limitations on Attendance

Accommodations which will be available to the American Bar Association in London at the time of the meeting are limited and, because of the possibility that more members may desire to attend than can be accommodated, it is necessary to impose certain restrictions. Since these limitations exist and since this is a professional meeting, a member may be accompanied only by his or her spouse. It is hoped that it will not be necessary to refuse any registration but in the event that more members and their spouses than can be accommodated desire to attend, preference will have to be given to those members who have most regularly attended annual meetings of the Association and those whose official positions require their attendance. **In anticipation of the necessity of determining which registrants shall be given preference, it is announced that only those registrations which have been received by July 1, 1956, will be considered in such determination.** Accordingly, acceptance of the registration fee at this time is tentative, subject to final confirmation or return at a later date. Confirmed registrations will not be subject to cancellation after April 1, 1957, so as to entitle the registrant to a refund of the registration fee.

### Future Announcements

As further details with respect to the meeting and its program become available, future announcements will be published in the JOURNAL. Members are, therefore, requested to watch each future issue for such information.

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Signed Articles

As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

## ■ *Hermits and Horses*

June brings its new crop of law school graduates again this year. With the shoals of the bar examinations ahead of them yet to be negotiated, they can look forward to little leisure from study and pursuit of the law. Three years of laying a foundation in law upon which to build their legal careers must have taught this spring's graduates, as it did us, that to be a lawyer is also to be a laborer. We congratulate these young men for their accomplishments to date and welcome them to their chosen field.

Scrutiny of any profession will inevitably reveal some men in it who are there primarily for the purpose of earning a living and nothing else. Another segment—a small one, we are happy to add—joins the ranks of the professions for the prestige it seems to afford them. Neither group will achieve success as *lawyers* because they are not dedicated to the ideals of the law.

The great men of the law have always been workers. Sir Edward Coke rose at 3:00 in the morning and studied until the courts opened; then he attended court; in the afternoon he studied and then exercised; after supper he studied until 9:00 when he retired to bed for his six hours of sleep. Daniel Webster knew that the lot of the lawyer was, as he said, to "work hard". Lord Eldon summed it up in capsule form when he was asked by William Wilberforce for advice on the best mode of study and discipline for young lawyers. Replied Lord Chancellor Eldon: "I know no rule to give them, but that they must make up their minds to live like a hermit and work like a horse."

Yet the law is not all working like a horse in ascetic solitude. The great men of the legal profession have all understood the necessity for work. They have been distinguished, however, for their fairness, their honesty, their courage and their courtesy. These are traits of character which are even more desirable in a lawyer than learning. Health, too, is more valuable than scholarship alone. A great law professor once wrote that a satisfying lifetime at the Bar requires four things: (1) a sound body; (2) a pleasing personality; (3) a good intellect; (4) a character that inspires confidence.

Character is probably the most valuable of all these qualities. The lawyer who can always be trusted to do the decent thing will have the confidence of other people, lawyers and laymen alike. So we pass on this bit of wisdom which we received from that self-same law professor whose students learned at his feet to live like hermits and work like horses: "Health, manner, brains, character—it usually takes all four to have a permanent satisfying success at the bar. Don't let the students get brains too close to the camera. Brains are cheap in the marketplace. It takes brains to be a success at the bar, but brains alone will not get a man very far."

## ■ *The Fifth Amendment: Yesterday, Today and Tomorrow*

The recent Fifth Amendment decisions of the United States Supreme Court make particularly startling reading of the article in this issue by R. Carter Pittman, bearing the above title. We commend it for your attention.

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## ...LOCAL IN APPLICATION

# A Review and Summary:

# The Federal Courts in 1955

by **Leland L. Tolman** · *of the New York Bar (New York City)*

**▪ The report of the Chief Justice as Chairman of the Judicial Conference of the United States is important to all members of the Bar interested in improving judicial administration in the federal courts. At the request of the Board of Editors, Mr. Tolman, former Chief of Business Administration of the Administrative Office of the United States Courts, has prepared this summary and review of the Chief Justice's report.**

▪ On December 27, 1955, Chief Justice Earl Warren, as Chairman of the Judicial Conference of the United States, issued his report of the proceedings of its regular annual meeting of September 19-20, 1955. The Conference, consisting of the Chief Judges of the eleven Federal Judicial Circuits, had on its agenda many subjects of importance; among them the annual report of Henry P. Chandler, the Director of the Administrative Office of the United States Courts, and, from the Department of Justice, a report by Deputy Attorney General William P. Rogers in behalf of Attorney General Brownell. It also received, considered and acted upon a number of reports of important Conference subcommittees dealing with such subjects as the supporting judicial personnel, court administration, the air conditioning of court quarters, habeas corpus to review state court decisions in criminal cases, the jury system, judicial statistics and pretrial procedure.

The report of the Chief Justice and the report of the Director of the Administrative Office together constitute a thorough accounting by the federal judicial branch to the American people of the conduct of this aspect of the public business; and they reflect the broad sweep of the problems of federal judicial administration.

### *Memorial for Chief Judge Stephens and Report of the Department of Justice*

The Conference opened its meeting by the adoption of a resolution in recognition of the recent death and distinguished service of one of its members, Chief Judge Harold M. Stephens of the Court of Appeals for the District of Columbia Circuit.

It then received Deputy Attorney General Rogers' report. Mr. Rogers discussed extensively the concern of the Department of Justice over "the continuing accumulation of pending cases and consequent delays in disposing of matters in the Federal Courts". He promised that the Department would do everything in its power during the next year "to correct a condition that has become almost chronic and which . . . unless corrected may become a disgrace to our Nation". He compared the situation in England, where "for some time now . . . no more than six months has been needed to try any case", with statistics of the Administrative office showing delays due to case backlog in some congested district courts ranging from 22½ months to almost 4½ years. He said the Department of Justice is eager to co-operate in the solution of the problem by expediting the handling of cases where the United States is a party which constitute nearly 60 per cent of all cases in the Federal District Courts. It hopes by this special effort to decrease its caseload by one fourth, thus reducing the court's total backlog approximately 15 per cent.

Outlining the preliminary steps taken to accomplish this, Mr. Rogers said the Department had forbidden United States Attorneys and their assistants to engage in the private practice of law, and requires them to devote their full time to the federal business. Staffs in critical areas have been enlarged, an Executive Office of United States Attorneys has been created to supervise the Department's field offices; a liti-

gation control system was established in the Department and empowered to assure the efficient processing of all matters, old and new; United States Attorneys were authorized to take prompt final action in many cases without prior approval from Washington.

Offering further aid to the judiciary, the Deputy Attorney General indicated that the Department of Justice supports the requests of the Conference to Congress for the creation of additional judgeships and for other legislation to increase the efficiency of the judicial branch. He also recommended the enactment of legislation to increase from $3,000 to $10,000 the minimum amount that must be claimed in diversity of citizenship litigation, and in this connection, he suggested that study be given to provision for denial of costs to a plaintiff who recovers less than the jurisdictional amount. He stated support for the proposals of the Conference to limit the habeas corpus review in district courts of criminal judgments of state tribunals and he outlined the study now under way in the Department of Justice to regulate the conduct of proceedings for the deportation of aliens.

He told the Conference of the encouraging administrative steps recently taken to make more fully effective the Federal Youth Correction Act, and the sympathetic interest of the Department in the proposals of the Conference for the provision of annuities for widows and dependent children of judges and for the establishment of a system of public defenders for indigent defendants in federal criminal cases.

## *The Business of the Courts in 1955*

The annual report of the Director of the Administrative Office was received and its publication authorized. Based upon that report, the Chief Justice summarizes in his report the current state of federal judicial business as follows:

*State of the dockets of the Federal courts—courts of appeals.*—The number of cases begun in the courts of appeals increased by a little more than 200 over 1954 to a total of 3,695 in the fiscal year 1955.

The increase has occurred in appeals from the courts, which have shown a steady upward trend since 1950, probably the result of a continuous increase in the number of contested cases and trials in the district courts and also the increased number of district judges. The number of cases terminated was 3,654, only slightly less than the number begun, leaving 2,175 pending on June 30, 1955. There was an increase of 60 percent in cases begun in the Second Circuit. Also there were increases of some importance in the First and Third Circuits. The Ninth Circuit showed a large decrease but still has a heavy pending caseload. The median time from filing to final disposition for cases heard and decided increased fractionally to 7.3 months but was considerably longer in the Ninth Circuit (15.8 months) and in the Sixth Circuit (10.3 months). For the first 4 numbered circuits and the Tenth Circuit, it was less than 6 months.

The number of petitions for certiorari from the courts of appeals to the Supreme Court was slightly more than last year and the number granted was 96 or 17 percent of the number acted on compared with 70 or 13 percent in the fiscal year 1954.

*District courts.*—Growing congestion in many district courts is shown by the increase in the number of pending civil cases during the year and the rise in the time required from filing to disposition of cases which are tried. This is a matter of serious concern to the Conference. In districts where 2 and even sometimes 3 years expire from the time answer is filed in a civil case to the date when it is tried, litigants are being denied that prompt service which the Federal courts should give.

The number of private civil cases filed annually—and this is by far the most time-consuming part of the courts' business—has more than doubled since the end of World War II and the pending private cases have almost tripled. The figures for the fiscal years 1945, 1950, and 1955 are as given below:

| Fiscal Year | Number of judgeships | Private civil cases | | |
|---|---|---|---|---|
| | | Filed | Terminated | Pending at end of year |
| 1945 | 198 | 17,855 | 16,753 | 16,239 |
| 1950 | 221 | 32,193 | 30,494 | 34,825 |
| 1955 | 250 | 39,225 | 37,363 | 47,621 |
| Percentage increase 1945-55 | 26% | 120% | 123% | 193% |

Each year since 1943 the number of private civil cases begun has exceeded the number terminated and the phenomenal growth in the number of pending cases is the result.

In the fiscal year 1955, the total of all cases filed, including both cases in which the Government was a party and those between only private litigants, was 59,375 or a few cases less than the number filed during the previous year. Cases terminated were 58,974 or over a thousand more than in 1954. The number of pending civil cases went up to 68,832.

The median interval from filing to disposition of civil cases in which a trial was held terminated in the district courts in the 86 districts having only Federal jurisdiction rose over a month to 14.6 months and there were 25 districts, which are listed in the annual report of the Administrative Office of the United States Courts, in which the time for disposition exceeded the national median. From issue to trial, the median time interval for the 86 districts was 9.1 months.

Among the congested districts some improvement has taken place in the Southern District of New York where the civil calendar has been reduced by almost 600 cases and the time for reaching trial (although still 38 months for personal injury jury cases) has been materially shortened.

The criminal business of the district courts has shown only a small change since the war if immigration cases arising in the districts on the Mexican border are eliminated. The number of criminal cases pending is small in comparison with the number filed during the year. In 1955, the number of cases filed was 35,310. Terminations were in excess of filings and 8,643 cases were pending at the end of the year of which 1,747 could not be tried because they involved fugitives or other defendants who were not in Federal custody. Criminal cases receive priority and generally speaking the criminal dockets are in satisfactory condition.

While bankruptcy cases increased, the rate of increase has dropped, particularly in the last half of the fiscal year 1955. The increase in the past year was in voluntary bankruptcy pe-

titions filed by individuals and not in business failures. Cases terminated increased by 8,700 over 1954 but still were less than the cases begun. The pending caseload rose to 55,592 which was higher than at any previous year's end since 1941.

### *Additional Judgeships*

Acting in the light of this report and the observations by the members of conditions in their various circuits, the Conference adopted new proposals for the provision by Congress of additional judgeships and, with the exception of an added judge for the Middle District of Pennsylvania and another for the District of Arizona, both of which it had previously proposed but now had withdrawn on account of changed conditions, it reaffirmed its previous recommendation for judgeships not yet provided by the Congress. The recommendations together are consolidated and result in the following complete list of Conference proposals for added judges.

Court of Appeals:

*Second Judicial Circuit*—The creation of one additional judgeship.

District Courts:

*Second Judicial Circuit*—District of Connecticut—The creation of one additional judgeship.

Eastern District of New York—The creation of one additional judgeship.

Southern District of New York—The creation of three additional judgeships.

*Third Judicial Circuit*—Eastern District of Pennsylvania—The creation of one additional judgeship.

*Fourth Judicial Circuit*—District of Maryland—The creation of one additional judgeship.

Eastern, Middle, and Western Districts of North Carolina—The creation of one additional judgeship.

*Fifth Judicial Circuit*—Southern District of Mississippi—The creation of one additional judgeship.

Eastern District of Louisiana—The creation of one additional judgeship.

Northern District of Texas—The creation of two additional judgeships.

Western District of Texas—The creation of one additional judgeship.

*Sixth Judicial Circuit*—Eastern District of Michigan—The creation of one additional judgeship.

Northern District of Ohio—The creation of one additional judgeship.

*Eighth Judicial Circuit*—Northern and Southern Districts of Iowa—The creation of one additional judgeship.

*Ninth Judicial Circuit*—District of Alaska—Third Division—The creation of one additional judgeship.

Northern District of California—The creation of one additional judgeship.

*Tenth Judicial Circuit*—District of Colorado—The creation of one additional judgeship.

District of Kansas—The creation of one additional judgeship.

### *Additional Districts and Divisions*

The Chief Justice reports that the Conference then reaffirmed its opposition, first stated in 1948, to the creation of any additional Federal Districts and its purpose when additional judicial service is necessary to recommend instead the creation of additional judgeships within existing judicial districts. It also disapproved legislation to create in the Northern District of California a new Eastern Division to sit in the City of Oakland.

The Conference then received an important joint report from its committees on court administration and on supporting court personnel, both of which are under the chairmanship of Chief Judge John Biggs, Jr., of the Third Circuit. The recommendations of the committee, all of which were approved by the Conference, included the following: (1) an increase of fifty deputy clerks in addition to the twenty-five new positions provided for in the current appropriation; (2) an increase of 115 probation officers and 124 clerk stenographers for probation officers, in addition to the seventy-one additional officers provided for in the current appropriation, in order to reduce the caseload per officer to seventy-five which the Administrative Office considers to be a desirable standard; (3) increases in the base salaries of probation officers from $4,525 per annum to $5,440 per annum, the salary ceilings for probation officers from $7,130 to $8,110, for deputy chief probation officers in large districts and chief probation officers in smaller offices from $8,110 to $10,710, for chief probation officers in metropolitan districts from $9,290 to $12,040 and the creation of a new position of Supervisory Probation Officer for large offices at an entrance salary of $7,570; (4) it reaffirmed the probation officer's standards of qualification (exemplary character, good health, age at first appointment between 24 and 45 years, college degree, and at least two years' social welfare experience, or two years of social welfare training, either in a social service school or a recognized university or college) and it recommended that legislation be enacted to permit the Conference to make its standards mandatory; (5) it recommended the addition to the court budgets of $25,320 to increase the staff and facilities of the Chicago Service Training Center established some years ago for the in-service education of newly appointed probation officers, and the provision by Congress of added funds

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for travel, to permit the probation service as a whole to function properly and to take maximum advantage of the Training Center; (6) it recommended that the minimum entering salary for all clerk-stenographers in the federal courts be raised to $3,415; (7) it recommended that the Conference direct the Administrative Office to undertake a comprehensive survey of the grades and salaries of all supporting personnel of the courts for submission to the committees for further recommendations by them as soon as possible; and (8) it authorized an increase of 7½ per cent in the salaries of National Park Commissioners in order to equalize them with recent increases given other federal employees. The subject of general increases in the compensation of all United States Commissioners was made the subject of further study.

### *Bankruptcy*

On report of its Committee on Bankruptcy Administration, chairmanned by Chief Judge Orie L. Phillips of the Tenth Circuit (retired) the Conference approved a number of changes in salaries of Referees in Bankruptcy and authorized the filling of several vacancies in the position of referee and some additional positions. It prescribed a number of changes in the locations of offices of referees, the territories they serve and the places of holding their hearings. It recommended the enactment of legislation to change Section 58e of the Bankruptcy Act to reduce the number of copies of orders and notices now required to be furnished by the referee to the Commissioner of Internal Revenue and the Comptroller General and to permit the combination, in a single document, of notices of the time for filing objections to discharge and of the first meeting of creditors. It renewed previous recommendations for a change in Section 48 (c) (1) of the Bankruptcy Act to increase the maximum rates of compensation for trustees in bankruptcy.

### *The Court Reporting System*

On the recommendation of the Director of the Administrative Office, the Conference authorized the basic annual salaries of the official court reporters to be increased generally by 7½ percent to bring them in line with salaries of other government employees which had been similarly increased during the previous year. The Conference also approved a reclassification of the positions of court reporters in the lowest salary bracket to include all of them within the next higher bracket. With the changes, the salary range of court reporters was fixed in three groups; the first to receive $5,375, the second $5,915 and the highest $6,450 per annum.

### *Air Conditioning Court Quarters*

Chief Judge John J. Parker, of the Fourth Circuit, reported to the Conference for a special committee appointed to plan the provision of air conditioning, particularly in courtrooms and court quarters where summer temperatures are so high that the holding of court at that time is practically impossible. The committee concluded that to remedy this condition, prompt steps should be taken to provide air conditioning for all courtrooms and other court spaces except in those rare portions of the country where the summer temperatures are not high enough to warrant it. The committee had prepared a list to receive priority of air conditioning treatment and obtained an appropriation of $1,150,000 to provide it and it requested authorization to proceed to obtain an additional $1,500,000 to carry the program on in other areas and other court offices during the coming year. The Conference approved the recommendations of the committee.

### *Travel Allowances for Court Personnel*

The Director of the Administrative Office reported that pursuant to legislation of the preceding Congress, he had increased the travel allowances for judicial personnel other than judges from $9 to $12 a day and for auto travel from 7 to 10 cents a mile. The Conference authorized him to procure additional funds from Congress to meet this increase.

### *Appropriations*

One of the duties of the Judicial Conference is to approve of estimated appropriations for the courts. In exercising its power in this respect, the Conference approved of supplemental estimates for the current year and estimates for the fiscal year 1957 submitted to it by the Director, amounting to over $30,000,000 including substantial additions to previously requested funds to take care of salary increases, costs of air conditioning and impersonal facilities all as approved at the present meeting.

### *Committee Reports*

Various further reports of existing committees of the Conference were presented. In the course of its consideration of these, the Conference re-approved legislation which has now passed the House of Representatives and is pending in the Senate, to correct serious complaints from the various states in reference to applications to the federal trial courts for writs of habeas corpus by persons in custody pursuant to the judgments of state courts. It re-affirmed recommendations of another committee to provide annuities, on a contributory basis, for widows and dependent children of judges comparable to those now allowed members of Congress. It reviewed extensively the operation of the jury system on the report of its jury committee, re-affirming its previous recommendations for legislation to regularize the office of jury commissioner and to establish uniform qualifications for jurors in the federal courts and it disapproved of legislation to permit women to serve as jurors subject to their voluntary right of declination. It also disapproved proposals to permit the appointment of special counsel and investigators to assist grand juries and to provide jury trial on request of either party in condemnation cas-

*(Continued on page 595)*

# Comparative Law:

# Separation of Powers in India

by **P. M. Bakshi** · *of the Rajasthan Judicial Service (India)*

**The first half of the twentieth century has seen the creation of literally dozens of new constitutional governments. Americans should be flattered that our own Constitution, the oldest national charter of government in the world, has influenced so many of the world's statesmen who are leading their own nations into prideful self-government. Mr. Bakshi's article is an interesting comparison of some of the common features of our Constitution and the new Constitution of India.**

The doctrine of separation of powers, as understood in the United States of America, means that there are three branches of the machinery of the state, each of which has its own functions, namely legislative, executive and judicial; and that each branch must be strictly limited to its own sphere and should not be allowed to trespass upon the sphere allotted to any other branch. A neat statement of the doctrine is found in the Massachusetts Declaration of Rights, 1780, as follows:

> In the Government of this Commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them. The executive shall never exercise the legislative and judicial powers, or either of them. The judicial shall never exercise the legislative and executive powers, or either of them. To the end it may be a Government of laws and not of man.

It follows that if the doctrine strictly applies, the legislature should never be allowed to assume judicial or executive functions. Powers of appointment and dismissal, supervision of the administrative set up and control of the executive would, according to this doctrine, be completely beyond the sphere of the legislature. Determination of disputes and adjudication of questions of fact or law would also be beyond the sphere of the legislature.

It may be noted here that even in the United States of America, where the doctrine of separation of powers has been most vigorously canvassed, it has not found favor in an absolute undiluted form. Intermingling of functions is, to a certain extent, inevitable, and has been accepted even in the United States of America. Now let us see how far the doctrine holds good under the Indian Constitution.

The first thing that strikes any person who begins a study of the Indian Constitution from this point of view is that there is no express declaration of the doctrine of separation of powers in the Indian Constitution. No words have been used solemnly affirming or formulating the doctrine in any particular article. The articles that relate to the legislative power, for example, do not say that the legislative power shall be vested in or shall exclusively reside in the Parliament (see Articles 79 and 245). Article 246 (1) does of course say that "Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I". But the words "exclusive power" in this clause are meant to exclude the state legislatures and are not intended to close the doors against the executive. Similarly, the articles relating to the judicial power do not say that the judicial power of the Union shall be exclusively vested in the Supreme Court (see Article 131 and the succeeding articles). In Article 131, the words "to the exclusion of any other court" are intended to exclude other courts; they do not embody any mandate of the Constitution-makers that no judicial function shall be conferred upon the legislature or the executive. Coming to the article relating to the executive power (Article 53), one does meet the words "the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution". But even here, one does not find words like "exclusively". It appears, therefore, that the constitution-makers did not consciously approve of the philosophy of separa-

tion of powers.

Secondly, an examination of the detailed provisions of the Constitution also supports the view that it was not the intention to lay down anything like "prohibited areas" for the three branches of the Government. There is a liberal mixture of functions of the one type with functions of another type, as the following analysis indicates:

I. *The Legislature.* (A) *Executive functions of the legislature.* The legislature exercises the following functions which are essentially of an executive nature:

(1) Voting in the election of the President (Article 55);

(2) Voting in the election of the Vice President, and his removal (Articles 66 and 67);

(3) Control of the Council of Ministers (Article 75, which says that the Council shall be collectively responsible to the House of the People);

(4) Removal of Judges of the Supreme Court and of the High Courts (Articles 124 and 217);

(B) *Judicial functions of the Legislature.* The legislature exercises the following functions which are essentially of a judicial nature:

(1) Impeachment of the President (Article 61);

(2) Certification of money bills through the Speaker (Article 110);

(3) Judicial functions in connection with parliamentary privilege, including committal for contempt (Article 105).

II. *The Executive.* (A) *Legislative functions of the Executive.* The Executive under the Indian Constitution exercises the following functions which are essentially of a legislative nature:

(1) Power of the President to promulgate ordinances (Article 123);

(2) Power of the President to make regulations for the peace and good government of all territories specified in Part D of the First Schedule and any other territory comprised within the territory of India but not specified in that Schedule (Article 243);

(3) The President's veto (Article 111);

(4) The President's power to issue a proclamation of emergency which has the effect of increasing the field of legislative powers of Parliament (Article 352);

(5) The President's power to suspend remedies for the enforcement of fundamental rights (Article 359);

(6) The President's power to issue a proclamation of failure of constitutional machinery in the states, which authorizes the Parliament to assume the legislative powers for that state—powers that can be delegated to the President (Article 356);

(7) The President's power to recommend money bills, and to give previous sanction to the bills to be introduced in state legislatures that might impose restrictions on the freedom of trade and commerce or intercourse with or within that state (Articles 117 and 304);

(8) The President's power to certify state laws relating to eminent domain (Article 31);

(9) The President's power to validate the existing state laws relating to taxes in respect of water or electricity stored or generated by interstate river development authorities (Article 288);

(10) The President's power to declare how far existing laws interfering with the freedom of trade, commerce and intercourse shall continue (Article 305);

(11) The President's power to make temporary provisions with respect to Jammu and Kashmir and to adapt existing laws in order to bring them into accord with the Constitution (Articles 370 and 372);

(12) The President's power to prorogue and dissolve the House of the People and to summon both Houses (Article 18);

(13) The President's power to assent to the amendment of the Constitution (Article 368).

(B) *Judicial functions of the Executive.* The Executive under the Indian Constitution exercises the following judicial functions:

(1) Power of the President to grant pardons and to suspend, remit or commute sentences in certain cases (Article 72);

(2) The President's power to decide questions as to whether a member of either House of Parliament has become subject to any disqualification for membership (Article 103).

III. *The Judiciary.* (A) *Legislative powers of the Judiciary.* At least one of the functions of the judiciary is legislative, namely, making rules for regulating its practice and procedure (Article 145);

(B) *Executive powers of the judiciary.* An example of this is the power to appoint officers and servants of the High Court (Article 46).

The survey made above will show that the Constitution does not pay homage to the doctrine, either by precept or by example.

It now remains to be seen whether the doctrine would have any utility in India. It is submitted that an action of any branch of the state in India cannot be declared invalid *merely* because the quality of the action is such that it belongs to another branch. In other words, an act of Parliament cannot be declared to be void merely because it amounts to adjudication provided it is otherwise valid, and the same rule would certainly apply to the judiciary. Conformity with the provisions of the Constitution is of course necessary, but conformity to the doctrine as such is not necessary for the validity of any measure.

The current of judicial authority supports this view. Certain observations of Sir Patric Spens, C. J., in *Piare Dusadh* v. *The Emperor* A.I.R. [1944] F. C. 1, 8, are sometimes cited in support of the view that the doctrine is to be followed in India. The observations are:

> As a general proposition, it may be true enough to say that the legislative function belongs to the Legislature and the judicial function to the judiciary. Such differentiation of functions and distribution of powers are in a sense part of the Indian law as of the American law.

But these observations should be read along with the context. On the same page of the report His Lordship observes that "in India the Leg-

islature has more than once enacted laws providing that suits which have been dismissed on a particular view of the law must be restored and retried". And further: "In view of the history of the rule in America, it is questionable whether it would be right to apply the same rule in this country". The facts in this case before the Federal Court were that the Special Criminal Courts Ordinance (Ordinance 2 of 1942) having been declared void in an earlier case by the Federal Court, the Governor-General had promulgated a new Ordinance (Ordinance 19 of 1943), by Section 3 of which it was provided that any sentence passed by the courts acting under the old Ordinance should have effect and should continue to have effect as if the trial had been held in accordance with the Code of Criminal Procedure by a court exercising competent jurisdiction under that Code. The validity of this section was challenged before the Federal Court, on the ground that it amounted to an exercise of the judicial power. The main argument on this point was that according to the American authority, legislative action cannot be made to retroact upon past controversy and to reverse decisions. The Federal Court expressly rejected this view and held that it cannot be applied in India. There are, of course, observations to the effect that the section in question did not amount to exercise of the judicial power, but it is doubtful if the court would have arrived at a different result even if the sections had been found to be an example of an exercise of the judicial power.

In a Patna case, *Bankey Singh* v. *Jhingan Singh*, A.I.R. [1952] Patna 166, a provision of a Bihar Act, declaring certain persons to have been in possession as "Raiyats" of certain lands on a particular date and prohibiting suits to question such possession and declaring decrees inconsistent with such possession to be void, was held to be ineffective, on the ground that "The State Legislature is not competent to reverse the decisions and orders of the court . . . because the power to nullify the decrees and orders of the court is purely a judicial power and the Constitution does not appear to have given jurisdiction to the legislature either expressly or by necessary intendment to arrogate to itself the power to adjudicate—a power which is exclusively within the jurisdiction of the court". Laxmi Kant Jha, C.J., relied upon the observations of Spens, C.J., already quoted, and observed that the power to reverse the decisions of the courts is essentially judicial and has not been conferred upon the legislature by the Constitution. His Lordship observed that though there is no express definition of the powers of the judiciary in the Constitution, still "it is well settled that when a department is created by the Constitution for the exercise of judicial authority, the Constitution contemplates the whole judicial power to be exercised by the Judicial Department alone", A.I.R. [1952] Patna 166, 173. It is respectfully submitted that this goes against the established practice of the Indian legislature, and there is no provision in the Constitution which indicates any intention to incorporate the doctrine of separation of powers. This case has been expressly dissented from in A.I.R. [1955] Patna 1, where the court expressly rejected the argument that the legislature under our Constitution cannot override the effect of a judicial decision (see page 31 of the Report). The question involved there was of the validity of the Bihar Land Encroachment Act 1950 (Bihar Act 31 of 1950), which directed the Collector to evict any person unauthorizedly occupying any land which is a public property. The argument of the appellant was, that "the Act adjudicates and does not legislate". Narain, J., while agreeing that there was no scope left in the Act for judicial determination by the Collector, held that "if the Act is constitutionally valid and within the legislative competence of the legislature and not void on the ground of repugnancy, then, there being no positive inhibition in our Constitution preventing the legislature from exercising judicial power, the Act cannot be declared invalid, simply because it is in effect adjudicating with regard to the rights of the parties". (The Act was, of course, held invalid in this case, not on the ground of the doctrine of the separation of powers, but on the ground that it violated the fundamental right relating to property).

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There is one more case of the Patna High Court, where Ramaswami, J., expressed the opinion, that "in India there is no doctrine or dogma of separation of the various powers. It is important to note that our Constitution has not vested the judicial power or the legislative power in separate departments of the State. The articles of our Constitution do not divide and establish areas of black and white", *Ram Prasad* v. *The State of Bihar*, A.I.R. [1952] Patna 195, 197. Sarju Prasad, J., expressed no final opinion on this point. This decision was reversed on

*(Continued on page 594)*

# Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

## Admiralty . . . *jurisdiction*

■ *Archawski* v. *Hanioti*, 350 U.S. 532, 100 L. ed. (Advance p. 436), 76 S. Ct. 617, 24 U.S. Law Week 4187. (No. 351, decided April 9, 1956.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Reversed and remanded.*

The sole issue in this case was the petitioner's right to invoke the admiralty jurisdiction of the federal court. The District Court held that the action was on a maritime contract, and thus within admiralty jurisdiction. The Court of Appeals reversed on the ground that the suit was in the nature of the ancient common law *indebitatus assumpsit*, which was not recognized in admiralty.

The libel alleged that the respondent, owner of a passenger vessel, had received money from the petitioners for passage to Europe. The voyage was abandoned and, it was alleged, the respondent "wrongfully and deliberately" pocketed the passage money in his own purse, with fraudulent intent.

Mr. Justice DOUGLAS, speaking for a unanimous Supreme Court, held that the case was properly one for the admiralty jurisdiction. A contract for the transportation of passengers is a maritime contract, the Court pointed out, and it refused to pay heed to the old fiction that treated the wrongful withholding of money as a contract to repay which could not be enforced in admiralty because it was not a maritime contract. The truth is, the Court observed, that there was neither a promise to repay nor a second contract. "It is sufficient . . . to hold that admiralty has jurisdiction, even where the libel reads like *indebitatus assumpsit* at common law, provided that the unjust enrichment arose as a result of the breach of a maritime contract."

The case was argued by Harry D. Graham for petitioner and by Israel Convisser for respondent.

## Air Law . . . *trade names*

■ *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79, 100 L. ed. (Advance p. 524), 76 S. Ct. 600, 24 U.S. Law Week 4194. (No. 410, decided April 23, 1956.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed and remanded.*

Air travellers who may have been embarrassed by presenting their North American Airlines baggage checks for redemption at the windows of American Airlines have the sympathy of the Supreme Court. This case dealt with the refusal by the Civil Aeronautics Board to grant petitioner's request to continue to use the name "North American Airlines" on the ground that the public confused that company with American Airlines.

Petitioner was organized as Twentieth Century Airlines, Inc. The Board issued a letter of registration as an irregular air carrier to petitioner in 1947. In 1951, petitioner began to call itself "North American Airlines" and in 1952, changed its name officially and requested the Board to reissue the letter of registration in the new name. Instead, the Board adopted a regulation requiring every irregular carrier to do business in the name in which its letter of registration was issued. Respondent applied for permission to use the name "North American Airlines". The Board decided that the name infringed upon the long-established name of the respondent and constituted an unfair method of competition in violation of Section 411 of the Civil Aeronautics Act. The Board found that there was "substantial public confusion" between the two airlines, and that the public interest required elimination of the name "North American Airlines". The Court of Appeals set aside the Board's order.

Mr. Justice MINTON, speaking for the Supreme Court, reversed and remanded. The Court based its holding upon its determination that the Board, to whose judgment Congress had committed such matters, had acted within its jurisdiction and had applied appropriate criteria. To the argument that the use of the name "North American" could not amount to an unfair method of competition, the Court replied that the words "unfair or deceptive practices or unfair methods of competition", as used in Section 411, were broader terms than at common law. The statute, said the Court, is not concerned with punishment or protection of injured competitors, but with the protection of the public interest.

The Court remanded the case for a review of the question whether the Board's findings were supported by substantial evidence, a point not reached by the Court of Appeals.

Mr. Justice DOUGLAS wrote a dissenting opinion in which Mr. Justice REED joined. The dissent argued that before the Board acted the public confusion should be substantial enough to threaten or impair the efficiency of air service. There was no such evidence here, the dissent declared; it pointed out that similar public confusion might exist between "Pan-American" and

"American Airlines", "Eastern" and "Northeast", "Western" and "Northwest", or, in the case of railroads, between Northern Pacific, Union Pacific, Western Pacific and Southern Pacific.

The case was argued by Howard C. Westwood for petitioner and by Walter J. Derenberg for respondent.

## Bankruptcy . . . *arrangements*

▪ *General Stores Corporation* v. *Shlensky*, 350 U. S. 462, 100 L. ed. (Advance p. 384), 76 S. Ct. 516, 24 U. S. Law Week 4141. (No. 170, decided March 26, 1956). *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

The ultimate question presented here was whether the petitioner corporation should be reorganized under Chapter X or Chapter XI of the Bankruptcy Act.

The petitioner instituted proceedings under Chapter XI, alleging that it was unable to pay its debts as they matured. It proposed an arrangement of its unsecured debts, none of which was evidenced by a publicly held security, but it did have some 2,000,000 shares of common stock of par value $1 listed on the American Stock Exchange. One of the shareholders—a holder of 3000 shares—and the Securities and Exchange Commission moved for dismissal of the proceedings unless the petition was amended to comply with the requirements of Chapter X. The District Court granted the motions and the Court of Appeals affirmed by a divided vote. The arrangement proposed by the petitioner under Chapter XI would extend its unsecured obligations and provide for a 20 per cent payment on confirmation of the plan and 20 per cent annually for four years thereafter. In oral argument, it was decided that this offer was not feasible and the unsecured creditors were offered the equivalent of 40 per cent of their claims in full satisfaction.

The opinion of the Supreme Court affirming was delivered by Mr. Justice DOUGLAS. Much of the argument of the case had been devoted to the meaning of the Court's decision in *Securities and Exchange Commission* v. *United States Realty Co.*, 310 U.S. 434, in which it was held that relief should have been sought under Chapter X rather than Chapter XI. It was argued that Chapter X provides for corporations whose securities are publicly owned, while Chapter XI is available to debtors whose stock is closely held; that Chapter X is designed for large corporations and Chapter XI for small.

The Court's opinion stressed the fact that these distinctions were improper. The character of the debtor, the Court said, is not the controlling consideration in a choice between Chapter X and Chapter XI. "The essential difference is not between the small company and the large company but between the needs to be served."

The Court thought that the lower courts had fairly read Chapter X and had reasonably concluded that the petitioner's business needed a "more pervasive reorganization than is available under c. XI".

Mr. Justice HARLAN took no part in the consideration or decision of the case.

Mr. Justice BURTON joined in Mr. Justice FRANKFURTER's dissenting opinion. This opinion took the position that the district court had been guided by inappropriate standards as a result of its misconception of the *United States Realty* case. The dissent pointed out that Congress had amended Chapter XI so as to eliminate the requirement that a plan under it be "fair and equitable". No consideration was given to this amendment, the dissent, said, although it would seem to show that Congress intended Chapter XI to be given a more generous scope.

The case was argued by Aaron Rosen and Frederic P. Houston for petitioner and by Max Goldwever, Leon Singer, William H. Timbers, and A. Alan Reich for the various respondents.

## Commerce . . . *motor carriers*

▪ *Frozen Food Express* v. *United States, Interstate Commerce Commission* v. *Frozen Food Express, American Trucking Associations, Inc.* v. *Frozen Food Express, Akron, Canton and Youngstown Railroad* v. *Frozen Food Express*, 351 U. S. 40, 100 L. ed. (Advance p. 500), 76 S. Ct. 569, 24 U. S. Law Week 4202. (Nos. 158, 159, 160 and 161, decided April 23, 1956.) *On appeals from the United States District Court for the Southern District of Texas. Reversed.*

Under the Interstate Commerce Act, the Interstate Commerce Commission has pervasive control over motor carriers. Such carriers must have certificates of public convenience and necessity and the Commission is granted certain powers of inspection. Section 203 (b), however, exempts from Commission supervision "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)..." The present case deals with this exemption.

The Commission held hearings to determine the meaning and application of the term "agricultural . . . commodities" which culminated in a report and order listing commodities that the Commission found to be exempt under Section 203 (b) and those that are not.

Frozen Food Express was a motor carrier which transported numerous commodities which the Commission had placed on its non-exempt list. It instituted suit before a three-judge district court to enjoin and set aside the Commission's order. The District Court dismissed the action, saying that the "order" was not subject to judicial review.

On appeal, the Supreme Court's reversal was delivered by Mr. Justice DOUGLAS. The Court distinguished *United States* v. *Los Angeles Railroad*, 273 U. S. 299, on which the District Court based its decision, say-

ing that the "order" in that case was no more than a report of investigation which might never be the basis of a proceeding before the Commission or a court. In the present case, said the Court, the determination by the Commission that a commodity is not an exempt agricultural commodity has an immediate and practical impact on carriers and shippers, and serves as the basis in ordering and arranging their affairs.

Mr. Justice HARLAN, dissenting, argued that the Commission's order was not intended to be a final one and was in effect simply a list of commodities considered by the Commission, not legally binding on anyone.

The cases were argued by Robert W. Ginnane for the Interstate Commerce Commission, Carl L. Phinney for the Frozen Food Express, Charles H. Weston for the United States and Charles P. Reynolds and Carl Helmetag, Jr., for the railroads.

■ *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express, Interstate Commerce Commission* v. *Frozen Food Express, Akron, Canton and Youngstown Railroad* v. *Frozen Food Express,* 351 U. S. 49, 100 L. ed. (Advance p. 505), 76 S. Ct. 574, 24 U. S. Law Week 4205. (Nos. 162, 163 and 164, decided April 23, 1956.) *On appeals from the United States District Court for the Southern District of Texas. Affirmed.*

Three motor common carriers complained to the Interstate Commerce Commission that the Frozen Food Express, another motor carrier, was transporting fresh and frozen meats and poultry without the required certificate of convenience and necessity. Frozen Food Express admitted transporting the commodities, but asserted that they were within the exemption of Section 203 (b), discussed in the companion cases *supra*. The Commission ordered the defendant to cease and desist from the unauthorized operations. Frozen Food Express filed suit before a three-judge District Court to have the Commission's order set aside. The District Court agreed that fresh and frozen meats were non-exempt, and no appeal was taken from that holding. The court held, however, that fresh and dressed poultry were exempt and restrained the Commission from enforcing its order as to these products.

The Supreme Court's opinion affirming was delivered by Mr. Justice DOUGLAS. The Court found that the legislative history supported the District Court's view of the statute, noting that killing, dressing and freezing a chicken is a change in the commodity, but no more drastic a change than that involved in pasteurizing and homogenizing milk, a commodity concededly exempt. The Court declared that "we cannot conclude that [dressing a chicken] . . . turns it into a 'manufactured' commodity".

Mr. Justice BURTON, joined by Mr. Justice FRANKFURTER, Mr. Justice MINTON and Mr. Justice HARLAN, dissented on the ground that administrative practice of fifteen years' standing gave sanction to the Commission's treatment of frozen poultry as non-exempt.

The cases were argued by Robert W. Ginnane for the Interstate Commerce Commission, David G. MacDonald for the East Texas Motor Freight Lines, Carl L. Phinney for Frozen Food Express, Charles H. Weston for the United States, and Charles P. Reynolds and Carl Helmetag, Jr., for the railroads.

### Commerce . . . *Transportation Act*

■ *Dixie Carriers, Inc.* v. *United States,* 351 U. S. 56, 100 L. ed. (Advance p. 510), 76 S. Ct. 578, 24 U. S. Law Week 4207. (No. 233, decided April 23, 1956.) *On appeal from the United States District Court for the Southern District of Texas. Reversed.*

In this case, the operators of certain barge lines sought a reversal of the Interstate Commerce Commission's refusal to order a lowering of the rate for joint rail-barge shipping of sulphur from Texas to Illinois. The charge for shipping sulphur from Galveston to Danville via barge and rail was $9.77 per ton, while the railroads had established a joint all-rail charge of $9.184. The total of the various local railroad charges for the same routing would have been $11.68.

The barge lines filed a complaint with the Commission which was dismissed. A three-judge District Court sustained the Commission's dismissal.

The Supreme Court, speaking through Mr. Justice DOUGLAS, reversed on the ground that the joint all-rail rates discriminated against the barge lines in violation of the Transportation Act of 1940, 49 U. S. C. §1. The Court declared that the statute required the Commission to fix rates that would preserve for shippers the inherent advantages of barge transportation. By establishing a joint all-rail rate and refusing to establish a joint rail-barge rate, the railroads were in effect discriminating against the barge lines by increasing the cost of barge service, the Court said. The Commission was under a duty to end such discrimination, it was held, because one of the purposes of the statute was to eliminate cutthroat competition whereby strong rail carriers might reduce their rates, putting the water carriers out of business.

The case was argued by Nuel D. Belnap for appellants, by Daniel M. Friedman for the United States, by Samuel R. Howell for the Interstate Commerce Commission and by John A. Daily for the railroads.

### Commerce . . . *workmen's compensation*

■ *Collins* v. *American Buslines, Inc.,* 350 U. S. 528, 100 L. ed. (Advance p. 433), 76 S. Ct. 582, 24 U. S. Law Week 4188. (No. 523, decided April 9, 1956.) *On writ of certiorari to the Supreme Court of Arizona. Reversed and remanded.*

This was a suit by the widow of a bus driver, killed in an accident on an interstate run between Los Angeles and Phoenix. The driver was a resident of California and was covered by that state's workmen's com-

pensation. The accident occurred in Arizona, and the widow sought an award from that state's Industrial Commission, which denied her claim on the ground that it had no jurisdiction.

The Arizona Supreme Court affirmed, basing its conclusion upon the theory that it would be an unconstitutional burden on interstate commerce to require the employer to insure in Arizona as well as California. When the case reached the Supreme Court of the United States, the Arizona Industrial Commission was the only active defendant.

Mr. Justice FRANKFURTER, speaking for the Court, reversed and remanded. Although the Court expressed some doubt about the standing of the Arizona Commission to raise the constitutional issue, it concluded that, even if the Commission had such standing, by virtue of its action over against the employer, the burden-upon-interstate-commerce argument was insubstantial. "Whatever dollars-and-cents burden an eventual judgment for claimants . . . may cast upon either a carrier or the State's fund is too insufficient, compared with the interest of the State in affording remedies for injuries committed within its boundaries", the Court said.

The case was argued by John P. Frank for petitioner and by John R. Franks for respondent.

### Constitutional law . . . *Immunity Act of 1954*

▪ *Ullmann* v. *United States,* 350 U. S. 422, 100 L. ed. (Advance p. 361), 76 S. Ct. 497, 24 U. S. Law Week 4147. (No. 58, decided March 26, 1956.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

This decision upheld the constitutionality of the Immunity Act of 1954, 68 Stat. 745, 18 U.S.C. (Supp. II) §3486, which requires a witness to give testimony that may be incriminatory in exchange for immunity from prosecution. The act is limited to testimony in cases or investigations involving national security, and the request for immunity must originate from a United States Attorney and have the approval of the Attorney General.

Ullmann refused to answer questions put to him by a grand jury in New York City which was investigating matters concerned with espionage and the national security. The questions involved the membership of Ullmann and others in the Communist Party, and Ullmann invoked the protection of the self-incrimination clause of the Fifth Amendment. Upon application of the United States Attorney, approved by the Attorney General, the court directed Ullman to answer the questions. He refused and was convicted of contempt. The Court of Appeals affirmed.

The Supreme Court delivered its opinion speaking through Mr. Justice FRANKFURTER.

In holding the statute valid, the Court cited *Brown* v. *Walker,* 161 U. S. 591 (1896), which upheld the constitutionality of a similar immunity act, rejecting Ullmann's efforts to distinguish between the two cases.

The Court also concluded that the statute did not leave the question of compelling the witness to testify to the discretion of the trial judge, and it had no difficulty in deciding that the function of the district court under the statute was confined within the scope of judicial power.

Ullmann had suggested that possible prosecution in state courts made the statute unconstitutional. The Court replied that the statutory language applied "in any court", which included state courts. Congressional power to provide for the national defense was held to be broad enough to enable it to restrict the exercise of state power in this area.

The Court also refused to overrule *Brown* v. *Walker* and return to a "literal" reading of the Fifth Amendment. " . . . the history of the privilege establishes not only that it is not to be interpreted literally, but also that its sole concern is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts. . . . ' ".

Mr. Justice REED noted that he concurred in the Court's opinion and judgment "except as to the statement that no constitutional guarantee enjoys preference".

Mr. Justice DOUGLAS, joined by Mr. Justice BLACK, wrote a dissenting opinion which argued that either *Brown* v. *Walker* should be overruled or the judgment should be reversed on the authority of *Boyd* v. *United States,* 116 U.S. 616, which the Court's opinion had distinguished. The dissent stressed the "numerous disabilities" attaching to a person who seeks the protection of the Fifth Amendment and argued that the purpose of the Amendment was to protect the conscience and dignity of the individual, as well as his safety and security, against the compulsion of government.

The case was argued by Leonard B. Boudin for Ullmann and by Charles F. Barber for the United States.

### Constitutional law . . . *self-incrimination*

▪ *Slochower* v. *Board of Higher Education of The City of New York,* 350 U. S. 551, 100 L. ed. (Advance p. 449), 76 S. Ct. 637, 24 U. S. Law Week 4178. (No. 23, decided April 9, 1956.) *On appeal from the Court of Appeals of New York. Reversed and remanded.*

▪ This decision held unconstitutional, as a denial of due process, a clause in the Charter of the City of New York which requires the discharge of any city employee who pleads the protection of the privilege against self-incrimination to avoid answering a question about his official conduct.

Slochower was an associate professor at Brooklyn College, an institution maintained by the City. In 1952, testifying before a Senate subcommittee he refused to answer questions about his alleged membership in the Communist Party in 1940 and

1941, invoking the privilege. He was dismissed from his position pursuant to the provisions of Section 903 of the New York City Charter. The dismissal was upheld by the state courts.

Mr. Justice CLARK spoke for the Supreme Court which reversed and remanded. The Court's opinion rested on the summary operation of the New York provision.

The Court condemned "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment", declaring that a witness might have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The Court found that the provision of the City Charter operated to discharge every city employee who invokes the privilege without any consideration being given to the nature of the questions asked, the remoteness of the period to which they are directed, or the justification for the exercise of the plea. Since no inference of guilt is permissible from the exercise of the privilege, the Court said, the dismissal in this case was wholly without support. The Court declared that the state had broad powers to select and discharge its employees, but the "summary dismissal" here violated due process.

Mr. Justice BLACK and Mr. Justice DOUGLAS joined in the Court's judgment and opinion, but noted that they also adhered to the views expressed in their dissents in *Adler* v. *Board of Education*, 342 U. S. 485, and *Garner* v. *Los Angles Board*, 341 U. S. 716, and in their concurrences in *Wieman* v. *Updegraff*, 344 U. S. 183.

Mr. Justice REED, joined by Mr. Justice BURTON and Mr. Justice MINTON dissented, this opinion taking the view that the city had a right to demand that its employees furnish facts pertinent to official inquiries.

Mr. Justice HARLAN wrote a dissenting opinion in which he argued that the Court was misconstruing the scope of the Charter as interpreted by the New York Court of Appeals.

The case was argued by Ephraim London for appellant and by Daniel T. Scannell for appellee.

## Courts . . . *jurisdiction of federal courts*

■ *Doud* v. *Hodge*, 350 U. S. 485, 100 L. ed. (Advance p. 398), 76 S. Ct. 491, 24 U. S. Law Week 4140. (No. 129, decided March 26, 1956.) *On appeal from the United States District Court for the Northern District of Illinois. Judgment vacated and cause remanded.*

The appellants here were a partnership and its agent, both Illinois residents. The partnership sold and issued money orders in Illinois. They sought an injunction in the federal district court to enjoin the Illinois Auditor of Public Accounts, the Illinois Attorney General and the State's Attorney of Cook County from enforcing the state Community Currency Exchange Act against them. Appellants argued that the state statute denied them equal protection in violation of the Fourteenth Amendment since it required them to obtain a license and submit to regulation, while the American Express Company, engaged in the identical business, is excepted from the act.

The District Court heard the case and made findings of fact, but ended by dismissing the complaint on the ground that it lacked jurisdiction in the absence of an authoritative determination by the Illinois Supreme Court on the constitutional question.

The Supreme Court of the United States reversed, speaking through Mr. Justice MINTON. In a brief opinion, the Court declared that it has "never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution simply because the state courts have not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute."

The Court held that the District Court did have jurisdiction and remanded the case to it.

The case was argued by John J. Yowell for appellants and by Latham Castle for the State of Illinois.

## Criminal law . . . *sedition*

■ *Pennsylvania* v. *Nelson*, 350 U. S. 497, 100 L. ed. (Advance p. 415), 76 S. Ct. 477, 24 U. S. Law Week 4165. (No. 10, decided April 2, 1956.) *On writ of certiorari to the Supreme Court of Pennsylvania, Western District. Affirmed.*

Pennsylvania's Sedition Act has been superseded by the federal Smith Act: The Supreme Court reached this conclusion in agreeing that the conviction of an acknowledged Communist in that state could not stand.

The conviction was overturned by the Pennsylvania Supreme Court on the narrow issue that the state law was superseded by the Smith Act, which proscribes the same conduct. The federal Supreme Court's decision was limited to the correctness of that ruling. The CHIEF JUSTICE, who spoke for the Court, stressed the fact that the decision did not affect the right of states to enforce their own sedition laws at times when the Federal Government has not occupied the field or where the Constitution and Congress have given the states concurrent jurisdiction. The Court's decision rested upon its findings (1) that the scheme of federal regulation was so pervasive as to imply that Congress left no room for the States to supplement it, (2) that the congressional scheme was "an all-embracing program for resistance" to totalitarian aggression, and (3)

that enforcement of the state sedition acts presented a serious danger of conflict with the administration of the federal program, the Court pointing out that the Government had urged local authorities not to intervene in subversive cases but to turn over to federal authorities all information concerning such activities.

Mr. Justice REED wrote a dissenting opinion in which Mr. Justice BURTON and Mr. Justice MINTON joined. The dissent argued that the cases cited by the Court in which state legislation was held to be superseded were commerce cases dealing with a comprehensive federal regulatory scheme. The dissent could find no such scheme here and argued that the Court should not invalidate the state legislation without a clear mandate from Congress.

The case was argued by Frank F. Truscott and Harry F. Stambaugh for petitioner and by Herbert S. Thatcher for respondent.

## Criminal Law . . . *appeals by indigents*

■ *Griffin* v. *Illinois,* 351 U. S. 12, 100 L. ed. (Advance p. 483), 76 S. Ct. 585, 24 U. S. Law Week 4209. (No. 95, decided April 23, 1956.) *On writ of certiorari to the Supreme Court of the State of Illinois. Judgment vacated and remanded.*

Petitioners were tried and convicted of armed robbery. They filed a motion in the trial court asking that a certified copy of the entire record, including a transcript of the proceedings, be furnished to them without cost. They alleged that they were "poor persons with no means of paying the necessary fees to prosecute an appeal". Under Illinois law, it is necessary for the defendant to furnish a bill of exceptions or a report of proceedings in order to obtain a full direct appellate review. Only indigent defendants sentenced to death are provided with a free transcript. Petitioners alleged that failure to provide them with the needed transcript was a violation of due process and equal protection. The trial court denied the motion, and the Illinois Supreme Court ruled that the allegations raised no substantial state or federal constitutional questions.

The Supreme Court of the United States vacated the judgment and remanded the cause.

Mr. Justice BLACK announced the judgment of the Court in an opinion in which the CHIEF JUSTICE, Mr. Justice DOUGLAS and Mr. Justice CLARK joined. This opinion argued that it was plain that it would be unconstitutional to deny a trial to defendants unable to pay court costs in advance, and that since appellate review was an "integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant", the Fourteenth Amendment protected petitioners from "invidious discriminations" at all stages of the proceedings.

Concurring in the disposition of the case, Mr. Justice FRANKFURTER maintained that the fact that Illinois could constitutionally deny the right of appeal in criminal cases or make reasonable classifications did not authorize "the imposition of conditions that offend the deepest presuppositions of our society" where appeals are allowed, like requiring defendants to be able to buy a transcript in order to secure a review.

Mr. Justice HARLAN wrote a dissenting opinion in which he declared that the record did not present the "clean-cut", "concrete" issue demanded for deciding constitutional questions. On the merits of the constitutional question, he could not find any arbitrary conditions attached to the exercise of the right of appeal in Illinois, and he pointed out that there is not a right of appeal in the sense that there is a right to a trial.

Mr. Justice BURTON and Mr. Justice MINTON wrote a dissenting opinion in which Mr. Justice REED and Mr. Justice HARLAN joined. This opinion found that the distinction the state made between capital and non-capital cases was reasonable and valid, and argued that the state was not bound to make all defendants economically equal before its bar of justice.

The case was argued by Charles A. Horsky for petitioner and by William C. Wines for respondent.

## Divorce . . . *alimony*

■ *Armstrong* v. *Armstrong,* 350 U. S. 568, (Advance p. 460), 76 S. Ct. 629, 24 U. S. Law Week 4173. (No. 38, decided April 9, 1956.) *On writ of certiorari to the Supreme Court of Ohio. Affirmed.*

In this divorce case, the husband, a resident of Florida, had obtained a divorce in the courts of that state. The wife had separated from him and established her residence in Ohio. Service on her in the Florida proceedings was constructive only. The Florida court granted the divorce and noted that Mrs. Armstrong "has not come into this court in good faith or made any claim to the equitable conscience of the court and has made no showing of any need on her part for alimony. It is, therefore, specifically decreed that no award of alimony be made to the defendant . . ."

Later, the wife brought suit in Ohio for divorce and alimony. The Ohio court denied the divorce on the ground that the Florida decree had already dissolved the marriage, but it awarded alimony. The husband now contended that the Ohio court denied full faith and credit to the Florida decree as to alimony.

The Supreme Court's opinion was written by Mr. Justice MINTON, and it determined that the Florida decree did not purport to adjudicate the absent wife's right to alimony, thus avoiding the constitutional issue raised by the husband.

The Court read the Florida decree as meaning that it would refrain from making an affirmative award of alimony. The Court said

that its decision was buttressed by the master's report on the Florida proceedings, which had stated that "the question of the wife's alimony, if any, cannot be determined at this stage of the proceeding", since most of the marital property was in the possession of the wife in Ohio and was the subject matter of litigation pending there.

Mr. Justice FRANKFURTER joined in the opinion of the Court, but added an opinion in which he argued that the writ should have been dismissed as improvidently granted.

Mr. Justice BLACK wrote a concurring opinion in which the CHIEF JUSTICE, Mr. Justice DOUGLAS and Mr. Justice CLARK joined. This opinion took the position that the Florida court had denied alimony and that the Florida decree and the Ohio decree were in conflict. This view presented the constitutional question of full faith and credit, and the dissent argued that Ohio was not compelled to give full faith and credit to the Florida decree denying alimony because the wife was not personally served in Florida and could not be bound by an *in personam* judgment there.

The case was argued by Robert N. Gorman for petitioner and by Walter K. Sibbald for the respondent.

### Indians . . . *capital gains tax*

■ *Squire* v. *Capoeman*, 351 U. S. 1, 100 L. ed. (Advance p. 477), 76 S. Ct. 611, 24 U. S. Law Week 4217. (No. 134, decided April 23, 1956.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Affirmed.*

This case raised the question of the proper tax treatment for the proceeds of a sale of standing timber on land held in trust by the United States for two members of the Quinaielt Tribe of Indians on the Olympic Peninsula. The Collector asserted that the proceeds were taxable as a capital gain, the respondents arguing that the attempt to levy the tax was in violation of an 1855 treaty between the United States and the Quinaielt tribe.

The treaty gave the Indians the exclusive use of the reservation on which the timber was located. The respondents, husband and wife, had received a patent for their tract pursuant to the General Allotment Act of 1887, the fee being held by the United States in trust for them. The land was forest land, not adaptable to agriculture, and of little value after the timber was cut. When the Bureau of Indian Affairs sold the timber in 1943, respondents filed a joint income tax return, reported a long-term capital gain and paid the taxes. At the same time, they filed a claim for refund, which was denied. The District Court found that the claim had been unlawfully denied and the Court of Appeals affirmed.

The CHIEF JUSTICE delivered the opinion of the Supreme Court affirming. The Court held that the imposition of the tax violated the Government's promise, expressed in the patent issued under the General Allotment Act, to transfer the fee "free of all charge or incumbrance whatsoever". The purpose of the allotment system, the Court explained, was to "prepare the Indians to take their place as independent, qualified members of the modern body politic", and to this end it is necessary to preserve the trust and the income therefrom. The Court said that it was unreasonable to infer that the Congress intended to limit or undermine its obligation to the Indian in enacting the income tax law.

Mr. Justice REED dissented, noting that in his view the sale price of the timber in excess of its market value on March 1, 1913, was a capital gain. "The gain is taxable income like the value of annual crops" he observed.

Mr. Justice HARLAN took no part in the consideration or decision of the case.

The case was argued by Charles F. Barber for petitioner and by John W. Cragun for respondent.

### Intoxicating liquors . . . *automobiles*

■ *Murdock Acceptance Corporation* v. *United States*, 350 U. S. 488, 100 L. ed. (Advance p. 400), 76 S. Ct. 536, 24 U. S. Law Week 4161. (No. 56, decided March 26, 1956.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed and remanded.*

This case concerned an automobile forfeited because it was used for the transportation of whisky on which the federal tax had not been paid. Petitioner was a finance company which had accepted a conditional sales contract when the automobile was purchased. A federal statute, 18 U.S.C. §3617, gives the District Court exclusive jurisdiction to remit the forfeiture to the extent of the interest of the finance company, provided that the finance company acquired its interest in good faith, had no reason to believe that the automobile would be used in violation of the liquor laws and "was informed in answer to [its] inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of liquor laws, or other principal local or Federal law-enforcement officer of the locality . . . that the [purchaser] had no . . . record or reputation" for violating the liquor laws.

The finance company had concededly satisfied the first two requirements. In order to comply with the third, it had inquired about the purchaser of the automobile at the state office of the Federal Alcohol and Tobacco Unit, which replied that the purchaser had no record or reputation as a liquor law violator, but added that the office did not keep a complete file of state and local arrests and prosecutions.

The District Court denied the remission of the forfeiture on the ground that the reply did not satisfy the statute since it expressly disclaimed any knowledge of the purchaser's record. The Court of Appeals affirmed, one judge dissenting.

The Supreme Court reversed in a *per curiam* opinion, noting that the reply was a form letter from the Internal Revenue Service expressly is-

sued for the purpose of satisfying the requirement of the statute and had been accepted for many years as compliance with the statute. The Court also held that the District Court could not withhold remission of the forfeiture in its discretion, under these facts, since there was no occasion for the exercise of that court's discretion.

Mr. Justice FRANKFURTER dissented without opinion.

The case was argued by T. H. Watkins for petitioner and by Solicitor General Simon E. Sobeloff for the United States.

## Labor law . . . *state jurisdiction*

▪ *United Mine Workers* v. *Arkansas Oak Flooring Company*, 351 U. S. 62, 100 L. ed. (Advance p. 514), 76 S. Ct. 559, 24 U. S. Law Week 4197. (No. 227, decided April 23, 1956.) *On writ of certiorari to the Supreme Court of the State of Louisiana. Reversed and remanded.*

At issue here was the power of a state court to enjoin picketing by a union which represented a majority of the employees but which had failed to comply with the registration provisions of the Taft-Hartley Act.

The respondent was subject to the National Labor Relations Act, but refused to bargain with the union, which represented some 174 of the 225 employees. The state supreme court affirmed the award of a permanent injunction on the ground that the union's failure to comply with the registration provisions of the Act deprived it of its right to picket in order to induce the company to recognize it as the bargaining representative.

In an opinion written by Mr. Justice BURTON, the Supreme Court reversed and remanded. The Court said that if the union had filed the data and the affidavits required by Section 9 (f), (g) and (h), there would have been no doubt of the state court's lack of jurisdiction, and, if the injunction had been sought under the auspices of the National Labor Relations Board, it would have been denied on the merits.

The effect of the union's failure to comply with the registration provisions of the statute, the Court said, was merely to deprive it of the services of the National Labor Relations Board. "The union's failure to file was not a confession of anything. It was merely the choice not to make public certain information" the Court observed. No penalty is prescribed for failure to file and its failure to file does not exempt the union from other applicable provisions of the Act; the company and its employees are bound by the statute. Since the union represented a majority of the employees, the Court held, the employer is obligated to recognize the union. While the union could not resort to the Board, it could take other lawful action, and since the federal remedy was exclusive, the state court was without jurisdiction.

Mr. Justice HARLAN took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER, in a dissenting opinion, argued that Congress intended to hamper noncomplying unions and to discriminate against them, and that it should not be inferred that it has withdrawn from the states power to regulate such a union.

The case was argued by Crampton Harris for petitioner and by John L. Pitts for respondents.

## Labor law . . . *Fair Labor Standards Act*

▪ *Mitchell* v. *Budd*, 350 U. S. 473, 100 L. ed. (Advance p. 391), 76 S. Ct. 527, 24 U. S. Law Week 4144. (No. 278, decided March 26, 1956.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed.*

This case presented the question whether the three respondent tobacco processors were exempt from the provisions of the Fair Labor Standards Act as engaged in preparing agricultural products. The Supreme Court held that they were not, overruling the Court of Appeals and reinstating the judgment of the District Court.

The Act, Section 13 (a) (10), exempts from its minimum wage and hour provisions "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market. . . ." The Administrator had defined "area of production" as "in the open country or [not in] any city, town or urban place of 2,500 or greater population". Two of the respondents process only tobacco grown on their own farms while the third confines its operations to tobacco grown by fifty-two neighboring farmers. The Court of Appeals reversed the District Court, holding that the Administrator's regulation was invalid, reasoning that "once geographic lines of the area of production have been established, the act makes the exemption effective within that area" and that any qualification by reason of size of the town where the establishment was located was invalid.

Mr. Justice DOUGLAS reversed for the unanimous Supreme Court. The regulation was valid, the Court reasoned, because the aim of Congress was to exempt employees "employed in agriculture" from the provisions of the act. The Administrator had stayed within the allowable limits of his discretion in defining "area of production" in terms of nearness to a center of population. The Court concluded that in the present case the agricultural operation ended with the delivery of the tobacco at the bulking plants. The Court was persuaded of this partly by the fact that of the 300 farmers in the area, only nine maintain and operate their own bulking plants, thus indicating that the bulking operation is divorced from the cultivation of tobacco, and partly by the fact that the bulking operation "significantly changes" the natural state of the freshly cured tobacco.

The case was argued by Bessie Margolin for petitioner and by Milton C. Denbo and Mark F. Hughes for the respondents.

**Labor law . . .**
***featherbedding***

■ *United States* v. *Green*, 350 U. S. 415, 100 L. ed. (Advance p. 355), 76 S. Ct. 522, 24 U.S. Law Week 4159. (No. 54, decided March 26, 1956.) *On appeal from the United States District Court for the Southern District of Illinois. Reversed and remanded.*

A jury found the appellees, a labor union and its agent, guilty of violation of the Hobbs Act, 18 U.S.C. §1951, which outlaws racketeering and the use of extortion in labor relations. The statute defines *extortion* as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right". The District Court granted motions in arrest of judgment "solely" on the ground that the court was without jurisdiction. The court said that the facts alleged did not state an offense and that a proper construction of the statute did not cover the type of activity charged in the indictment.

Mr. Justice REED spoke for the Supreme Court, which reversed and remanded, disagreeing with the trial court that the Hobbs Act covers only the taking of property from another for the extortioner's personal advantage.

The Court noted that the Hobbs Act was passed after its decision in *United States* v. *Local 807*, 315 U.S. 521, which had held that the Federal Anti-Racketeering Act of 1934 did not apply to labor disputes. The legislative history of the Hobbs Act makes it clear, the Court said, that it was intended to cover the employer-employee relationship. While the Hobbs Act provides that its provisions shall not affect Sections 6 and 20 of the Clayton Act, the Norris-LaGuardia Act, the Railway Labor Act or the National Labor Relations Act, the Court observed "There is nothing in any of those Acts, however, that indicates any protection for unions or their officials in attempts to get personal property through threats of force or violence. Those are not legitimate means for improving labor conditions."

Mr. Justice DOUGLAS, joined by the CHIEF JUSTICE and Mr. Justice BLACK, dissented on the ground that the Government had no right to a direct appeal since the District Court's judgment, in this view of its holding, rested in part upon the insufficiency of the evidence. Under 18 U.S.C. §3731, the Government is entitled to a direct appeal only if the District Court's judgment was placed "solely upon the invalidity or construction of the statute".

The case was argued by Solicitor General Simon E. Sobeloff for the United States and by Arthur M. Fitzgerald for the appellees.

**Process . . .**
***out-of-state service***

■ *Petrowski* v. *Hawkeye-Security Insurance Co.*, 350 U. S. 495, 100 L. ed. (Advance p. 405), 76 S. Ct. 490, 24 U. S. Law Week 4163. (No. 469, decided March 26, 1956.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Reversed and remanded.*

In a *per curiam* opinion, the Supreme Court here upheld the jurisdiction of a District Court over the respondent, who had filed a power of attorney with the Commissioner of Motor Vehicles of Wisconsin. Respondent contended that this did not authorize the commissioner to accept service of process in this case.

The respondent had answered the complaint by contesting the jurisdiction of the Court, but afterwards filed a motion to amend its answer and interplead, counterclaimed, filed a stipulation adding a party-plaintiff, and a stipulation that judgment be entered against the insured in favor of the additional party-plaintiff.

The Court disposed of the case in a brief opinion, which recited the facts and declared that the respondent, by its stipulation, had waived any right to assert a lack of personal jurisdiction.

The case was argued by Richard P. Tinkham, Jr., for petitioners and by Victor M. Harding for the respondent.

**Shipping . . .**
***Jones Act***

■ *Schulz* v. *Pennsylvania Railroad*, 350 U. S. 523, 100 L. ed. (Advance p. 430), 76 S. Ct. 608, 24 U. S. Law Week 4189. (No. 282, decided April 9, 1956.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Reversed.*

This was a suit under the Jones Act, 41 Stat. 1007, 46 U.S.C. §688, brought by the widow of a tug fireman to recover damages for the death of her husband who was drowned while at work for the respondent. It was alleged that the respondent was negligent in not providing the husband with a safe place to work. The district judge directed a verdict for the defendant, saying that "There is some evidence of negligence, and there is an accidental death. But there is not a shred of evidence connecting the two." The Court of Appeals affirmed.

The Supreme Court reversed in an opinion delivered by Mr. Justice BLACK. The Court summarized the evidence, noting that the husband's job required him to work on four tugboats docked side by side, three of which were wholly unlighted, on a dark winter night. He had had to step from one boat to another in the dark except for his flashlight. His half-clothed body was found several weeks after his disappearance, his flashlight in his hand. It was conceded that death was accidental.

With these facts, which the jury might have believed, the Court ruled that the trial judge erred in withdrawing the case from them. The plaintiff was entitled to recover if the death was the result "in whole or in part" of the Company's negligence, the Court declared, and reasonable men could have inferred that the death was a result of the

failure of the employer to provide a safe place to work.

Mr. Justice FRANKFURTER noted that he would have dismissed the writ of certiorari as improvidently granted.

Mr. Justice REED, Mr. Justice BURTON and Mr. Justice MINTON dissented without opinion.

The case was argued by Nathan Baker for petitioner and by Joseph P. Allen for respondent.

### Taxation . . . *business expense deduction*

▪ *Millinery Center Building Corporation* v. *Commissioner of Internal Revenue*, 350 U. S. 456, 100 L. ed. (Advance p. 381), 76 S. Ct. 493, 24 U. S. Law Week 4157. (No. 255, decided March 26, 1956.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

In April, 1924, the petitioner leased land in New York City for twenty-one years with an option to renew the lease for two further periods of twenty-one years each. It erected a twenty-two story building on the land at a cost of $3,000,000. Title to the building was held by lessee, but it would vest in the lessor at the termination of the lease. During the first twenty-one year period, petitioner fully depreciated the entire $3,000,000 cost of the building. An amendment to the lease in 1935 provided for payment to the lessor of an annual rental of $118,840. In 1945, petitioner exercised its option to renew the lease until 1966. In May, 1945, petitioner purchased the fee and obtained release from the obligations of the renewed lease. It paid $2,100,000 for the fee. The value of the unimproved land was set at $660,000. Petitioner sought to deduct $1,440,000 as an ordinary and necessary expense of doing business under Section 23 (a) (1) (A) of the 1939 Internal Revenue Code. The Commissioner determined a deficiency and the Tax Court agreed. The Court of Appeals affirmed the refusal to allow the deduction, but reversed and remanded on the ground that petitioner should be allowed to depreciate the portion of the $2,100,000 purchase price properly allocable to the value of the building. The Court of Appeals returned the case to the Tax Court to fix that value.

The Supreme Court affirmed, speaking through Mr. Justice FRANKFURTER. Petitioner contended that it already owned the building and that it had entered into the purchase agreement to avoid the excessive rental. This transaction involved a current business expenditure of $1,440,000, it argued.

The Court disagreed, saying that petitioner's claim that it "owned" the building was loose and misleading. The value of the land as unimproved land was said to be irrelevant, since petitioner was paying rent for improved land and there was no evidence that the rent was excessive for what it was actually leasing. The purchase price was the cost of acquiring the complete fee to land and building, both capital assets, and no ordinary business deduction was allowable.

The case was argued by Bernard Weiss for petitioner and by Solicitor General Simon E. Sobeloff for the Commissioner.

### Taxation . . . *state franchise tax*

▪ *Werner Machine Company, Inc.* v. *Director of Division of Taxation*, 350 U. S. 492, 100 L. ed. 402, 76 S. Ct. 534, 24 U. S. Law Week 4162. (No. 63, decided March 26, 1956.) *On appeal from the Supreme Court of New Jersey. Affirmed.*

A state franchise tax measured by the net worth of a corporation is valid even though the net worth includes certain federal bonds. The Supreme Court so held here, agreeing with the New Jersey courts in a *per curiam* opinion.

The New Jersey tax was imposed on each domestic corporation "for the privilege of having or exercising its corporate franchise" in the state. The tax was measured by the corporation's net worth. The state tax commissioner included certain federal bonds in figuring the appellant's 1952 assessment, over protests that under 31 U.S.C. §742 these bonds were immune from state taxation. The New Jersey courts upheld the Commissioner.

The Supreme Court's *per curiam* opinion dismissed the contention that the tax was really a direct property tax on the immune obligations, saying that corporate franchises were a legitimate subject of state taxation, and this tax was expressly declared to be a franchise tax in the statute. The Court was unimpressed by the argument that the effect was the same as if the tax had been imposed directly on the federal securities, saying that "the tax remains the same whatever the character of the corporate assets may be". The Court cited cases that had consistently held that franchise taxes may be measured by a yardstick that includes tax-exempt property.

The case was argued by Charles Goodwin, Jr., for the appellant and by Harold Kolovsky for the appellee.

### Taxation . . . *state tax liens*

▪ *International Harvester Credit Corporation* v. *Goodrich*, 350 U. S. 537, 100 L. ed. (Advance p. 440), 76 S. Ct. 621, 24 U. S. Law Week 4183. (No. 82, decided April 9, 1956.) *On appeal from the Court of Appeals of the State of New York. Affirmed.*

Appellants in this case were contesting, on the ground that it was a taking of property without due process, a tax lien imposed by the State of New York on motor carriers operating trucks on the highways of the state. The tax was assessed on the carrier and the lien for its collection was imposed on the trucks in the carrier's possession which had been operated in the state.

Appellants were the assignees of vendors of three tractor trucks sold to a carrier that owed unpaid taxes.

The trucks had been sold under conditional sales contracts. The carrier became delinquent on its sales contracts and the appellants repossessed the vehicles. The state asserted its lien on each truck for the entire amount of the unpaid taxes, a total of some $3,698.04. The narrow issue presented was the validity of the liens measured by the carrier's operation of trucks other than the three sold by appellants' assignors. Some of the taxes secured by the state's lien were measured by the carrier's operations before it purchased the appellants' trucks and some of the taxes were for the operation of other trucks owned by the carrier. There was no controversy as to the validity of the state's lien for that portion of the tax attributable to the operation of the three trucks in question.

Mr. Justice BURTON delivered the opinion of the Supreme Court which affirmed the state court's decision that the liens were valid. The Court said that the state was justified in treating the vendor's rights as security interests rather than absolute interests, since the vendor had yielded control of the trucks to the carrier. "The burden placed on the highways has been precisely the same as though the carrier had held unencumbered title to the trucks" the Court remarked. The Court reasoned that the state's "unquestionable right" to regulate the use of conditional sales contracts in the state bolstered the state's position. The Court pointed out that there would be no doubt about the validity of a lien asserted on all vehicles in the carrier's fleet if the tax were computed at a flat rate.

Mr. Justice BLACK concurred in the result.

Mr. Justice HARLAN took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER, joined by Mr. Justice DOUGLAS, dissented, arguing that the lien should not be asserted for the portion of the tax attributable to the carrier's operations prior to purchase of the three trucks in question, since the vendor had no way of knowing of the unpaid taxes and no way of protecting himself except by avoiding conditional sales.

The case was argued by John Lord O'Brian for appellants and by James O. Moore, Jr., for appellees.

## Nominating Petitions–A Correction

■ The nominating petition for State Delegate published under the heading "Virginia" on page 471 of the May issue should have been the petition of Stuart T. Saunders, of Roanoke. Through an unfortunate error, the first paragraph of the petition of Arthur J. Freund, of St. Louis, Missouri, was repeated under the heading "Virginia" followed by the signatures of the members who had signed Mr. Saunders' petition.

The JOURNAL extends its apologies to all concerned and publishes below the correct petition nominating Mr. Saunders for the office of State Delegate for Virginia:

**Virginia**

■ The undersigned hereby nominate Stuart T. Saunders, of Roanoke, for the office of State Delegate for and from the State of Virginia to be elected in 1956 for a three-year term beginning at the adjournment of the 1956 Annual Meeting:

Joseph L. Kelly, Jr., W. R. C. Cocke, Dudley DuB. Cocke, Jordan A. Pugh III, Hugh S. Meredith, Sidney H. Kelsey and P. A. Agelasto, Jr., of Norfolk;

J. B. Browder, Richard Florance, A. Scott Anderson, Alexander W. Parker, F. D. G. Ribble, Lewis F. Powell, Jr., H. Merrill Pasco, T. Justin Moore, Jr., John W. Riely, Archibald G. Robertson, William H. King, Eppa Hunton IV and Robert P. Buford, of Richmond;

Martin P. Burks, Robert B. Claytor, John P. Fishwick, Frank W. Rogers and A. Linwood Holton, Jr., of Roanoke.

## Make Your Hotel Reservations Now!

■ The Seventy-Ninth Annual Meeting of the American Bar Association will be held in Dallas, Texas, August 27 to August 31, 1956. Information with respect to the schedule of meetings appears at page 250 of the March issue of the JOURNAL.

Attention is called to the fact that many interesting and worthwhile events of the meeting will be arranged, as usual, to take place on Saturday and Sunday, August 25 and 26, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 27.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago, 37, Illinois, and should be accompanied by payment of the $10.00 registration for *each lawyer* for whom reservation is requested. *Be sure to indicate three choices of hotels* and give us your definite date of arrival as well as probable departure. *All space in the Statler Hilton, Baker and Adolphus Hotels is now exhausted.* Sleeping accommodations are still available in the following air-conditioned hotels: Cliff Towers, Crestpark, Dallas, Highlander, Lawrence, Loma Alto, Lynn, Mayfair, Melrose, Miramar, Southland, Stoneleigh, Travis, White-Plaza, Whitmore, and Wynnewood. Accommodations are also available in the following air-conditioned motor hotels: Belmont, Dallasite, Lido, Parkway and Oaks Manor.

Reservations will be confirmed as promptly as possible.

More detailed announcement with respect to the making of hotel arrangements may be found in the January issue of the JOURNAL, page 78.

# What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE

Richard B. Allen • ASSISTANT

**Actions . . .**
***excessive rents***

■ Tenants suing in New York courts for damages based on allegedly excessive rents set by the Federal Housing Administrator have been told that they have no remedy, at least in New York.

The plaintiffs in a representative action claimed money damages resulting from the excessive rents. The ground of their action was that their landlord had misrepresented the cost of construction of the housing unit to the FHA and had in turn received a so-called windfall profit and a rent schedule based on the misrepresented cost.

Federal Housing Administration procedures require that the Administrator establish rents sufficient to provide a reasonable return to the owner, based upon his expenses, including mortgage payments. Thus, the plaintiffs contended, the blown-up mortgage resulted in excessive rentals.

The New York Court of Appeals affirmed the dismissal of the complaint on two grounds. First, the Court said, state courts have no power to revise official acts, such as rent fixing, of federal officials under federal laws. Furthermore, tenants alleging damage of this nature have no remedy unless there is a statute granting a remedy. Thirdly, the Court rejected the plaintiffs' contention that they were third-party beneficiaries of a contract between the builder-operator and the Federal Government. The Court found there was no contract for their benefit and that, even if there were, the plaintiffs were not suing on that contract, but were in effect attempting to set it aside.

(*Fieger* v. *Glen Oaks Village*, Court of Appeals of New York, February 16, 1956, Desmond, J., 309 N.Y. 527, 132 N.E. 2d 492.)

**Antitrust Laws . . .**
***professional football***

■ In the face of what it termed "a good argument" that the immunity of organized baseball from antitrust laws is nothing more than a historical accident, the Court of Appeals for the Ninth Circuit has ruled that professional football is likewise beyond the pale of the Sherman and Clayton Acts.

In *Toolson* v. *New York Yankees*, 346 U.S. 356, the Supreme Court adhered to a 1922 decision (*Federal Baseball Club* v. *National League* 259 U.S. 200) that professional baseball is not a trade or business and therefore not subject to antitrust legislation. But in *U.S.* v. *International Boxing Club*, 348 U.S. 236, the Court held that professional boxing had to be governed by federal antitrust legislation.

Caught between the two cases, the Ninth Circuit declared the question was: "Is professional football business or sport more like the business of boxing or like the business of baseball?" Answering, the Court found the key to be that football, like baseball, is a team sport, while boxing is an individual sport. Thus, it continued, the argument in favor of the reserve clause that it maintains team balance in a league is as compelling when applied to professional football as to baseball. In short, the Court said, it seemed reasonable to assume "that if Congressional indulgence extended to and saved baseball from regulation, then the indulgence extended to other team sports".

The Court found, moreover, that the complaint did not state a cause of action.

(*Radovich* v. *National Football League*, United States Court of Appeals, Ninth Circuit, March 27, 1956, Chambers, J.)

**Attorneys . . .**
***employment***

■ The Supreme Court of New Jersey has ruled that an out-of-state law firm cannot employ a New Jersey attorney on a salary to practice in New Jersey in its name.

The foreign firm, no member of which was admitted in the state, represented a major residential real estate developer engaged in development in New Jersey. The firm retained the New Jersey attorney at a weekly salary to operate an office which it established in one of the newly-constructed homes and to supervise title and loan closings. A sign bearing the out-of-state firm's name was placed outside the office.

The Court agreed with the presentment of an ethics and grievance committee that the New Jersey attorney was guilty of permitting a non-admitted attorney to practice in New Jersey in his name. But, the Court concluded, because the problem was novel and there was no wilful violation, the attorney should not be disciplined "upon due proof that [he] has disassociated himself from his present arrangement".

(*Matter of "X"*, Supreme Court of New Jersey, March 26, 1956, *per curiam*, 121 A. 2d 489.)

**Civil Procedure. . .**
***discovery***

■ Under Illinois pretrial discovery procedures, the names of the opposition's witnesses cannot be ascertained, but, according to the Supreme Court of Illinois, the names and addresses of "occurrence witnesses" can be learned.

**Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.**

The plaintiff had submitted written interrogatories to the defendant requesting the "names and addresses of all witnesses in possession of the defendant who were occurrence witnesses to the plaintiff's injury" and the "names and addresses of all persons in possession of the defendant who witnessed plaintiff's injured condition subsequent to the accident until she was removed from defendant's streetcar".

The defendant declined to answer on the ground that the questions called for the names of the other party's witnesses and attempted to obtain the protected "work product of the lawyer".

But the Court disagreed. It held that the interrogatories used the word "witness" in its primary sense of those having knowledge of an event rather than in the technical sense of those who might be called to testify. The Court ruled that the scope of discovery practice in Illinois was not confined to that historically available in equity. It declared that the interrogatories were proper even in the absence of a specific rule, such as Rule 26 of the Federal Rules of Civil Procedure, which permits the discovery of the "identity and location of persons having knowledge of relevant facts".

(*Krupp* v. *Chicago Transit Authority*, Supreme Court of Illinois, January 19, 1956, modified on denial of rehearing March 19, 1956, Schaefer, J., 8 Ill. 2d 37, 132 N.E. 2d 532.)

## Constitutional Law . . . *film censorship*

■ Chicago's police commissioner and mayor may continue to apply prior restraint on freedom of speech through their power to license motion pictures for exhibition, according to the United States District Court for the Northern District of Illinois.

The Municipal Code of the City of Chicago places film licensing power in the police commissioner and directs that he shall not license films for a variety of reasons, one being that the picture is "immoral or obscene". The only appeal is to the mayor and his decision is final.

Finding these provisions to be constitutionally unobjectionable in *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 334, 121 N.E. 2d 585 (40 A.B.A.J. 1086; December, 1954), the Supreme Court of Illinois held that a motion picture was obscene within the meaning of the ordinance if, when tested with reference to its effect on a normal, average person and considered as a whole, "its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess".

In the instant case both the police commissioner and the mayor denied a license to *The Game of Love*. The Court viewed the film and had no trouble deciding that it was "immoral or obscene" within the meaning of those terms as outlined by the Illinois Supreme Court.

It conceded, however, that it was confronted with a serious problem in determining "whether the interest of the state in this particular area is a sufficiently overriding consideration as to justify an ordinance authorizing a prior restraint upon the freedom of expression". Viewing the landmark case of *Near* v. *Minnesota*, 283 U.S. 697, as not foreclosing all prior restraints on freedom of speech, the Court ruled that freedom of speech is a political right which is neither unlimited nor absolute. It declared that the licensing of films is a proper exercise of the police power reserved to the individual states and that a state need not "wait until a questionable film is shown and then resort to remedy by way of protracted criminal proceedings".

The Court also rejected a contention that the terms "immoral" or "obscene" are so vague and uncertain that the ordinance was unconstitutional.

The Court did not feel compelled, in the absence of a complete record, to give persuasive weight to the *per curiam* reversal order of the Supreme Court of United States in *Holmby Productions, Inc.* v. *Vaughn*, 350 U.S. 870, 76 S. Ct. 117. In *Holmby* the Supreme Court of Kansas had ruled that a statute of that state banning motion pictures that are "obscene, indecent or immoral" is not unconstitutional as vague or as an unlawful prior restraint (177 Kan. 728, 282 S.W. 2d 412). The Court in the instant case declared that it could not assume that the Supreme Court decided so vital a question as the states' power to censor obscene films by way of a *per curiam* order.

(*Times Film Corporation* v. *Chicago*, United States District Court, Northern District of Illinois, March 21, 1956, Perry, J.)

## Constitutional Law . . . *segregation*

■ In a decision that may presage the judicial attitude toward leasing of the public-school system to avoid desegregation, the Court of Appeals for the Fourth Circuit has held that a state may not abridge the right of citizens to use a public park without racial discrimination by leasing the park to a private operator.

In so doing, the Court approved a provision in an injunction "that if said park or any part thereof is leased, the lease must not, directly or indirectly operate so as to discriminate against the members of any race".

Virginia's Seashore State Park was involved. The state contended that the park could not be operated profitably without racial segregation. Leasing of the park was being contemplated for that reason.

The Court declared it was clear under recent decisions that segregation could not be permitted in public parks, and it added that it was equally clear that the right to use public parks without racial discrimination could not be denied through a lease for private operation. "And it is no ground for abridging the right", it added, "that the parks cannot be operated profitably on a non-segregated basis." Since leasing was being contemplated, it concluded, it was proper "to insert in the decree a provision which would protect the

rights of [the Negro] plaintiffs in the event of a lease."

(*Department of Conservation and Development* v. *Tate,* United States Court of Appeals, Fourth Circuit, April 9, 1956, *per curiam.*)

## Criminal Law . . . *habeas corpus*

▪ A woman attorney's attempt to test the effect of a Maryland statute by making herself the guinea pig has failed.

The attorney felt that a 1955 act of the Maryland legislature had the effect of abolishing the office of justice of the peace. To test her theory, she parked her car in the middle of an intersection. She was arrested and taken before a justice of the peace after she refused to sign a summons agreeing to appear in a court designated as the People's Court, which was the tribunal the attorney thought had replaced justices of the peace.

Upon her further refusal to post collateral, she was committed to custody of the sheriff, but was later released on her own recognizance. She then sought to test the power of the justice of the peace by a habeas corpus proceeding.

But the Court of Appeals of Maryland ruled that the writ of habeas corpus "is available only to liberate persons who are in actual, involuntary, illegal restraint". A person who contrives or brings upon himself his own confinement cannot have the benefits of habeas corpus, the Court said. And the writ cannot be granted to one who has already been admitted to bail, it added.

(*Hendershott* v. *Young,* Court of Appeals of Maryland, March 8, 1956, Hammond, J., 120 A. 2d 915.)

## Husband and Wife . . . *torts*

▪ A married woman may maintain an action against her husband for a prenuptial tort, the Supreme Court of Missouri has decided. The Court reached this result by construing a Missouri statute, and remarked that the common-law fiction of the unity of husband and wife is not persuasive under present-day conditions.

The plaintiff was injured in an automobile accident while riding in a car driven by her future husband. The suit was filed two days before the parties were married.

While two Missouri cases hold that a wife may not sue her husband for a personal tort committed during coverture, the Court relied for its decision on a statute providing that " . . . any personal property, including rights in action, belonging to any woman at her marriage . . . shall . . . be and remain her separate property and under her sole control . . . and any such married woman may . . . as a party plaintiff institute and maintain any action . . . including rights in action as aforesaid. . . . "

The Court reasoned that the wife's cause of action came into being when she was single and remained her separate property, to be redeemed after marriage, even if redeemed against her husband. Even if the statute did not provide specific authority for the suit, the Court continued, any reasons for existence of the common-law rule that premarital claims are extinguished by marriage have ceased to exist and the rule is not applicable now.

(*Hamilton* v. *Fulkerson,* Supreme Court of Missouri, December 12, 1955, modified and rehearing denied January 9, 1956, Coil, C., 285 S.W. 2d 642.)

## Insurance Law . . . *accidental death*

▪ When does death result from bodily injuries sustained solely through external, violent and accidental means, directly or independently of all other causes? Two Illinois Appellate Courts have struggled with this question in recent accidental-death cases.

In one case, the insured, engaged with another person in an arson plot, participated in spreading gasoline throughout a house preparatory to burning it. He re-entered the house to get some bed spreads when the gasoline ignited and burned both the house and the insured.

Rejecting the contention of the insurer that death occurred as a result of one whole and unlawful transaction which was designed and set in motion by the insured, the Appellate Court for the Third District separated the preparations for the fire and the fire itself. The premature ignition of the fire, the Court declared, was accidental, and the insured's death resulted from accidental fire, rather than from the arson preparations.

Looking at the case from the standpoint of proximate cause, the Court thought the premature fire was an independent, intervening causal factor, and that the natural consequence of the insured's own acts did not encompass his death.

One judge dissented. He said that the insured's re-entry of the house was so inseparably connected with the arson plan that there was no occasion to discuss proximate cause. He felt, moreover, that recovery was contrary to public policy.

(*Taylor* v. *John Hancock Mutual Life Insurance Company,* Appellate Court of Illinois, Third District, February 23, 1956, rehearing denied March 23, 1956, Reynolds, J., 9 Ill. App. 2d 330, 132 N.E. 2d 579.)

▪ In the other case, the insured was killed when his car went out of control while he was driving at an excessive speed. The Appellate Court for the Second District held that while the insured had set in motion a series of events which resulted in his death, he died of an accidental injury because the consequences of his action were unforeseen and unexpected. Thus, the Court concluded, the insured's death was accidental within the meaning of the policy.

The Court declared that the insured "clearly failed to exercise judgment, was careless, reckless, perhaps foolhardy, but it does not follow that he intended to destroy himself [and] his death was not the rational, natural and probable result of his intentional act. . . . "

(*Rodgers* v. *Reserve Life Insurance Company,* Appellate Court of Illinois, Second District, February 15, 1956, Dove, J., — Ill. App. 2d —, 132 N.E. 2d 692.)

## Labor Law . . .
### *organizational activity*

■ Although union organizational activity is protected by the National Labor Relations Act, the Court of Appeals for the Seventh Circuit thinks that wearing "Don't Be a Scab" buttons is disruptive and goes beyond the area of protected activity.

The union was the certified bargaining agent. About 1,450 of 1,900 employees were union members. During a membership drive, a few hundred employees wore the "scab" buttons. They were suspended by the employer and unfair labor charges were filed with the National Labor Relations Board.

The Court declared there was a fine line between protected and unprotected activities in membership solicitation. Quoting from *Republic Aviation Corporation* v. *NLRB*, 324 U.S. 793, it said the task was balancing the "undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments".

The Court held that the "scab" buttons would prove disruptive of employee harmony and destructive of plant discipline. Activities which carry a tendency toward disturbing efficient operation of the employer's business are not protected organizational activities, the Court reasoned. "Perhaps no greater disruptive force can be found in the field of labor relations than that innate in the application of the term 'scab' to one employee by his fellow workman", the Court concluded.

(*Caterpillar Tractor Company* v. *NLRB*, United States Court of Appeals, Seventh Circuit, March 2, 1956, Lindley, J., 230 F. 2d 357.)

## Medical Profession . . .
### *ethics*

■ A California court has held that a principle of medical ethics providing that one physician should not disparage another physician formerly in charge of a case cannot be applied where the disparagement occurs in a report submitted in evidence to the state's Industrial Accident Commission.

The canon of ethics involved provides that when one physician succeeds another in charge of a case "he should not disparage by comment or insinuation, the one who preceded him". The petitioner was asked to prepare an opinion for use before the industrial commission as to whether the deceased husband of an applicant for compensation had died as a direct result of an industrial accident. In the course of his statement, the petitioner made disparaging remarks about the pathologist who had performed an autopsy on the decedent.

After a series of administrative hearings, the physician was expelled from his local medical association. He commenced an action for mandamus for reinstatement.

The California District Court of Appeal for the First District held that the physician's report in which the remarks occurred was privileged because it was prepared and used solely for the purpose of evidence in the industrial commission proceeding. The Court declared that the public policy dictating a privileged status for testimony and pleadings in a judicial proceeding "should ban a medical association by-law which holds over each of the members the threat of expulsion if in his testimony (oral or written) before a court or other judicial body he 'disparages, by comment or insinuation' another physician".

The Court ruled, moreoever, that the medical ethics involved should not be interpreted to interfere with the judicial process. It said that it was a fair inference that the American Medical Association did not intend the canon to define the duty of a physician as a witness in a judicial proceeding.

The Court, however, found two other charges against the petitioner proved, but it returned the case for a redetermination of the penalty since the expulsion had been determined on the basis of all violations together.

(*Bernstein* v. *Alameda-Contra Costa Medical Association*, California District Court of Appeal, First District, February 16, 1956, Wood, J., 293 P. 2d 862.)

## Taxation . . .
### *capital gain?*

■ The Court of Appeals for the Fifth Circuit has ruled that the absolute transfer for value of $854,993.25 in oil payments to a transferee until he received $120,000, with automatic reconveyance to the transferor thereafter, is an assignment of anticipated income taxable to the transferor, and not the sale or exchange by him of a capital asset.

The transferee was a contractor and the purpose of the transaction was to pay him for the construction of a house for the transferor (taxpayer). It was contemplated that the assignment would pay out in two years, but it was accomplished sooner.

The taxpayer contended that the transaction was the sale or exchange of a capital asset, permitting him to treat the proceeds of the sale, being the value of the house, as a capital gain, and the contractor to treat the oil payments received by him as gross income subject to the depletion allowance.

With this theory the Court disagreed. Conceding that an oil payment is an interest in property, the Court declared that it did not automatically follow that a transfer of an oil payment qualified as a "sale or exchange of a capital asset" within the meaning of §117 of the Revenue Code of 1939. Looking at the cases dealing with similar transfers, the Court concluded that "the teaching of the cases [is] that we must determine whether such transaction is for a substantial interest in the total property owned by the transferor". It then ruled that the transaction did not qualify as the sale of a capital asset, but was only the transfer of so much of the taxpayer's income.

(*Commissioner* v. *Hawn*, United States Court of Appeals, Fifth Circuit, March 27, 1956, Tuttle, J.)

**Taxation . . .**
***gross income***

▪ Writing an engrossing treatise on gambling, the Court of Appeals for the First Circuit has ruled that a professional bookmaker does not realize a gain, profit or gross income, within the meaning of §22 of the Internal Revenue Code of 1939, every time he wins a bet with one of his customers.

The gambler was tried and convicted for failure to file an income tax return for 1951. The Government contended that he had a gross income in excess of $600 for that year on either of two theories: (1) that his income consisted of his unadjusted total receipts, or (2) that his income was the amount of his total winning bets for the year. The Government's evidence was such that he could be convicted only if one of these concepts was followed. The trial judge rejected the first, but instructed the jury in accordance with the second.

The First Circuit ruled the instruction erroneous and reversed the conviction. The Court drew a distinction between professional gamblers and casual gamblers and presented two other theories under which income might be gauged. Without determining what theory might be correct, the Court declared that the "appropriate unit for calculating [a professional gambler's] 'gains' under §22 may or may not be the net result over the yearly operation, but in any event it cannot be a unit which encompasses anything less than the total of his net profits (winning bets less losing bets) on every race."

One judge concurred in a separate opinion and one dissented.

(*Winkler* v. *U.S.*, United States Court of Appeals, First Circuit, March 8, 1956, Hartigan, J., 230 F. 2d 766.)

**United States . . .**
***removal of marshals***

▪ A United States marshal is an executive rather than a judicial officer, according to the United States Court of Claims, and he may be removed by the President at will.

The plaintiff was appointed marshal on April 8, 1952, and was removed by the President on June 29, 1954. A four-year term is provided by 28 U.S.C.A. §541(c). Claiming that a marshal cannot be removed during his four-year term but only after the term's conclusion and before a successor is appointed, the plaintiff sued for alleged lost salary.

Noting that it is settled law that the President can dismiss any executive officer before the expiration of the statutory term of office, the Court ruled that a marshal is an executive officer whose duties are ministerial and purely executive.

The Court suggested that the result of the plaintiff's argument would be that a marshal could be removed during the four-year term only by impeachment. This could not have been the intention of Congress, the Court concluded.

(*Farley* v. *U.S.*, United States Court of Claims, April 3, 1956, Littleton, J.)

**What's Happened Since . . .**

▪ On March 12, 1956, the Supreme Court of the United States:

REVERSED (unanimously, with MR. JUSTICE HARLAN not participating) the decision of the Court of Appeals for the District of Columbia Circuit in *Cammer* v. *U.S.*, 223 F. 2d 322 (41 A.B.A.J. 646; July, 1955). The Supreme Court ruled that an attorney is not a court "officer" who can be summarily tried for contempt under the Federal Contempt Statute [18 U.S.C.A. §401 (2)].

DENIED a motion to recall the mandate and to set down for oral argument on the merits in *Naim* v. *Naim*, 197 Va. 80, 87 S.E. 2d 749 (41 A.B.A.J. 857; September, 1955). In this case the Supreme Court of Appeals of Virginia had held that Virginia's miscegenation statute does not violate the due process and equal protection clauses of the Fourteenth Amendment. Upon appeal to the United States Supreme Court, the judgment was vacated and the case remanded to the Supreme Court of Appeals of Virginia (76 S. Ct. 151; 42 A.B.A.J. 75; January, 1956). The Court said that inadequacy of the record and the failure of the parties to bring all relevant questions to the Court prevented a consideration of the constitutional issue. On the remand, however, the Virginia Court adhered to its previous decision (90 S.E. 2d 849; 42 A.B.A.J. 355; April, 1956) and declared that there was no Virginia law or rule of practice under which the case could be sent back to the trial court for determination of the points thought to be covered inadequately. Now in its subsequent order of March 12, 1956, the Court said that the action of the Virginia Court "leaves the case devoid of a properly presented federal question".

▪ On March 26, 1956, the Supreme Court of the United States:

AFFIRMED (7-to-2, with majority opinion by MR. JUSTICE FRANKFURTER) *U.S.* v. *Ullman*, 221 F. 2d 760 (41 A.B.A.J. 557; June, 1955), the decision of the Court of Appeals for the Second Circuit holding constitutional the Immunity Act of 1954, 18 U.S.C.A. §3486, under which, in national security cases, a witness may be compelled to testify, despite the privilege of the Fifth Amendment, in return for immunity from prosecution based on what his testimony might reveal.

▪ On April 9, 1956, the Supreme Court of the United States:

DENIED CERTIORARI in *Bramblett* v. *U.S.*, — F. 2d — (42 A.B.A.J. 353; April, 1956), leaving in effect the decision of the Court of Appeals for the District of Columbia Circuit that the three-year statute of limitations did not bar the 1953 indictment of a former Representative in Congress, under the False Statement Act, 18 U.S.C.A. §1001, for falsely representing to the House Disbursing Office in 1949 that a certain person was entitled to compensation as his clerk and thereafter continuing such designation and converting the salary to his own use throughout 1950, since the offense was a continuing one.

# Department of Legislation

**Charles B. Nutting, Editor-in-Charge**

**■ One of the most significant developments in teaching law students the rudiments of legislative drafting is described by Dean Read in the following article. Of particular interest is the relation between the Nova Scotian government and the Dalhousie Law School in the Nova Scotia Center for Legislative Research.**

## The Nova Scotia Center for Legislative Research

**By Horace E. Read, Q. C.**
**Dean of the Faculty of Law, Dalhousie University**

■ Nova Scotia has long pioneered in government and education. The first supreme court in English-speaking Canada, "the elder sister of Canadian judicature", was established there in 1754, and in 1758 the first legislature. In that legislature in 1841, the principle of responsible government was first asserted successfully in the British Empire outside of the United Kingdom. In this province, in 1802 the first university charter in what is now Canada was granted to King's College, and in 1883 at Dalhousie University students were admitted to the first Canadian law school teaching the common law. In the present era of maturity of the common law and rapid economic and social change, it is therefore not surprising that this province has been the first to make a beginning toward providing the means for the organized research necessary for wise statutory development. In June, 1950, the Nova Scotia Center for Legislative Research was established at Dalhousie University Law School.

The Center was the first co-operative project of its kind to be undertaken by a law school and a government and is, on a modest scale, an experiment in both legal education and public service. Its functions are, first, to provide law students with some experience in methods of research and drafting essential for effective legislation and, secondly, to make the result of their work, whatever its worth, available to the legislature. The long-range plan is to keep Nova Scotia laws under objective and politically disinterested study with the aim of discovering how to develop them best to fit the needs of the province. The project was made feasible by endorsation of the late Angus L. Macdonald, Q.C., S.J.D.,[1] while he was premier, and the co-operation of the Legislative Counsel,[2] who acts as Associate Director of the Center. The author, who teaches the course in legislation at the law school, is Director. A work room with special library facilities is provided in the law school building. Work done by the students is the practical laboratory portion of their course in legislation and faculty members are consultants in their special fields.

The amount of careful research that can be accomplished by forty or fifty students as part of their total work load is limited, but much of it has proved useful. For example, over a three-year period, they did the basic research and the first draft for the revision of the Nova Scotia statutes, covering the period since 1923, that has recently been brought into force under the title, *Revised Statutes of Nova Scotia, 1954*. In addition, during the past five years they have done the research and drafting for several statutes making significant changes in the law. As part of their research they investigated and made comparative analyses of the methods of handling the same or similar problems in other provinces of Canada, states of the United States and other countries, and consulted social scientists and other experts, welfare agencies, provincial and civic organizations and governmental departments.[3]

Among the statutes prepared in the Center that have made significant changes in the law of the province have been the *Proceedings Against the Crown Act* of 1951,[4] the *Societies Act* of 1953,[5] the *Survival of Actions Act* of 1954[6] and the *Interpretation Act* of 1954.[7] The *Proceedings Against the Crown Act* deprives the executive branch of immunity from suit by enabling a person who has a claim to bring an action to enforce it against the Crown in all cases in which (a) his land, goods or money is in possession of the government, or (b) the claim arises out of a contract with the government, or (c) the government is alleged to have caused him injury in a way that would render a person of full age and capacity liable in tort. The *Societies Act* is the first general act in the history of the province governing the creation, administration, regulation and dissolution of charitable and all other kinds of non-profit corporations. The *Survival of Actions Act* is to a large extent an adaptation to the local situation of the corresponding English statute. By virtue of this Act, when a person dies the causes of action subsisting against or vested in him now survive against or for the benefit of his estate.[8] The new *Interpretation Act* was prepared as a necessary tool for drafting the *Revised Statutes of 1954* and was enacted in that year.

Two years of careful and exhaus-

1. A full-time Professor of Law at Dalhousie from 1924 to 1930; S. J. D. (Harvard) 1929; Premier of Nova Scotia 1933-1940 and 1945 until his death in 1954; Minister of National Defence for Naval Affairs of Canada 1940-1945.
2. Henry F. Muggah, Q.C.
3. See Appendix A following footnote 15.
4. 1951 N.S., c. 8, now R.S.N.S. 1954, c. 225.
5. 1953 N.S., c. 11, now R.S.N.S. 1954, c. 268.
6. 1954 N.S., c. 12, now R.S.N.S. 1954, c. 282.
7. 1954 N.S., c. 2, now R.S.N.S. 1954, c. 136.
8. Except when the action is for adultery or for inducing one spouse to leave or remain apart from the other.

tive research laid the foundation for a bill for a *Testator's Family Maintenance Act* which was drafted in final form in 1955. This bill is now pending in the legislature with the endorsation of the Nova Scotia Barristers' Society. Complete testamentary freedom has until now been the prevailing policy in this province.[9] The broad objective of the proposed act is to give the dependents of a testator or testatrix the right to apply to a court for and be provided with a reasonable maintenance out of the estate when there has been a failure to provide for their proper support. The students and their consultants have tried to embody in the measure the result of the entire judicial experience of interpreting and applying such statutory restraints on testation within the British Commonwealth since enactment of the New Zealand prototype in 1900.[10] The result is a draft act which is substantially similar to the Canadian Uniform Act[11] but differs from it by being expressly declaratory of the principal criteria which the courts have taken into account when exercising the discretion conferred by similar acts elsewhere, and by being more explicit in its procedural provisions.

Another bill that is being introduced at the current session of the legislature is one prepared in the Center in co-operation with the Board of Legal Research of the Nova Scotia Barristers' Society. It is for an *Act To Simplify Conveyances of Interests in Land*. This is a completely original legislative instrument which attempts to provide a concise and easily usable substitute for the prolix and redundant "common law deed" customarily in use. Studies are also being carried on under auspices of the Board of ways to modernize the administration of estates, what to do about the Statute of Frauds, and how to improve judicial procedure.

Also this year, some other novel questions are being explored. In co-operation with the Director of Child Welfare of the province, a group of students is investigating the problem of improving the legislation on adoption of children. Another group is preparing the groundwork for an act to set up and regulate a family court. Another, at the request of the Deputy-Attorney-General, is devising a province-wide scheme of magisterial inquiry to replace coroners' investigations.

The Associate Director of the Center has been a member of the Conference of Commissioners on Uniformity of Legislation in Canada since 1947 and is now its Secretary. The Director has been a member since 1950. Consequently the resources of the Center have been made available to the Conference for assistance in research and drafting, and the students have had the advantage of participating in the preparation of proposed legislative measures of Canada-wide significance.

During 1951-52 and 1952-53 students assisted in preparing the final draft of new conflict of laws provisions of the *Uniform Wills Act*.[12] This involved completely rewriting the Canadian version of Lord Kingsdown's Act so as to rectify the error of the English Parliament in its reference to "personal estate" instead of "movables", and to restate adequately and accurately the general rules of the conflict of laws governing the formal and intrinsic validity of w''s.[13]

At the request of the Conference the major part of the *Uniform Wills Act*, governing the execution of wills, was redrafted during 1952-53 in conformity with the latest drafting style and practices of the Commissioners.[14] After some consideration of this part of the act as rewritten, the Commissioners at their 1953 meeting decided that the substantive law on the subject should be revised, re-stated, and expanded to include rules governing holograph wills. During 1953-54, as the first step toward the revision, an annotation was completed in the Center showing (a) all enactments of the Provinces of Canada corresponding to each provision in the Uniform Act, and (b) the cases interpreting and applying them up to April, 1954.[15] The substantive revision is still under way.

An extensive project completed for the Conference concerned the *Highway Traffic Rules of the Road* that had been as to the substance chiefly prepared by a special committee and considered by the Conference in 1952. During 1952-53 students in the Center completely rewrote and rearranged these Rules in accordance with a request from the Conference. Incidentally, the original draft was reduced from ninety-nine to sixty-seven sections with considerable improvment in form, clarity and style. This draft of the Rules was discussed extensively at the 1953 meeting of the Conference and after some further revision by a committee of experts was adopted in 1955.

A proposal for a modernized uniform "innkeepers" act resulted in preparation of a first draft in 1952-53. This draft was subjected to detailed criticism of its substance at the 1955 meeting of the Conference and is now under re-examination in the Center.

Legislation is a second-year course at Dalhousie. It lasts for the academic year and covers both the making and applying of statutes, essentially in the manner prescribed in Read and MacDonald, *Cases and Other Materials on Legislation*. There are two hours of class-room discussion each week with collateral work in the Center. The work room of the Center is in charge of a teach-

9. Subject to dower.

10. The Family Protection Act, 1900, N.Z. Stat. 64 Vict. No. 20. See Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Descendants' Family Maintenance Legislation*, 69 HARV. L. REV. 276 (1955) for a thorough, detailed review and appraisal of this legislation and judicial experience in the British Commonwealth.

11. Completed by the Commissioners on Uniformity of Legislation in 1945, based principally on the New Zealand Act, and now in force in Alberta and Manitoba (1947 Alta. c. 12 and R. S. M. 1954 c. 264). British Columbia, Saskatchewan and Ontario have not adopted the Uniform Act, but have similar legislation: See R.S.B.C. 1948 c. 336, R.S.S. 1953, c. 121, and R.S.O.1950, c. 101.

12. This was suggested by Dr. John D. Falconbridge, Q.C., author of ESSAYS ON THE CONFLICT OF LAWS (2d ed. 1954).

13. See Proc. of the Conf. of Comm. on Uniformity of Leg. in Canada, 1953, pages 17, 51-52.

14. *Ibid.*, 1953, pages 41-50.

15. *Ibid.*, 1954, pages 38-72.

ing assistant, who provides immediate supervision and consultation. For research and drafting the class is divided into "work groups" of two students each and assignments are made to these groups, never to a single student. The number of groups to whom a project is assigned is determined by its extent and complexity. Sometimes as many as twelve students have been required. When there are four or more, they select one of their number as chairman. This group system ensures experience in co-operative problem solving. Round table discussions with the sponsor of the project, the Associate Director and Director are held at suitable stages as the work progresses.

As an instrument for legal education the Center has some special advantages. Students are taken out of the hypothetical area of the class room and the law-in-books, and are confronted with the actualities of law in action. They are invited to engage in the creative processes of policy making and of formal expression of policy in the way most likely to ensure its effective pursuance by legal means. They have an opportunity to gain first hand recognition, not often to be found by analysis of judicial decisions, of social, economic and political change. They come into personal contact with, and acquire some appreciation of, the psychology, functions and problems of government officials at various levels of authority and responsibility. They consult with experts, representatives of pressure groups and politicians. They discover the reasons for, and dangers of, "inspirational" or hit-or-miss law making. In these and other ways students are enabled to gain more than some minor practice in employing mechanics of research and in drafting; they can gain an understanding of why and how statutes are made. When they practice the art of statutory interpretation in the modern manner, this understanding enables them to discover relevant material extrinsic to the text, to evaluate it realistically and use it effectively.

By taking an active part in the preparation of one or two statutes the student does not acquire much skill, but he gains an insight into the difficulty of the problems encountered and some knowledge of the methods and devices which, intelligently used, are most likely to yield sound solutions. No other student experience is so well calculated to teach him the fundamentals of legal research and drafting. What is learned here is potentially useful in every professional activity, including fact finding, planning and communication of ideas, whether a lawyer be in private practice or public service.

**Appendix A**

As a guide for research they have used the questionnaire devised for the purpose by the author during sixteen years of teaching the course in legislation at the University of Minnesota Law School. It is included in Read and MacDonald, CASES AND OTHER MATERIALS ON LEGISLATION, pages 912-913, (Foundation Press, Inc. 1948) as follows:

1. What is the subject matter of the proposed new law, i.e., with exactly what phases of human affairs, economic, social, or political is the proposed law concerned?
2. What reliable data, literature, expert opinion and advice on the present problem in its economic, social and political aspects are available? What is their accumulative effect?
3. What is the present law of this state (or country) on the subject?
4. What is the broad objective of the proposed new law?
5. What are the specific fact situations for which the present law is alleged to provide an inadequate or undesirable solution?
6. Does the alleged defect actually exist?
7. If so, is the situation unique to this state (or country), or has the same or a similar defect in the law been dealt with by the legislature of any other state or country?
8. If another state or country has dealt with such a defect, what statutory remedy did it devise?
9. What has been the experience of such other state or country in applying its statute judicially and administratively? Have any theoretical and practical difficulties been encountered? If so, what means have been taken to overcome them?
10. Have the above-mentioned statutes of other states or countries been judicially or administratively construed?
11. Have the governmental officers charged with the administration of such statutes any criticism or suggestion for improving them?
12. Has the legislature of this state (or the Congress) ever considered or enacted legislation in any phase of human affairs essentially related to the subject now under consideration? If so, what has been its general policy? Would any statutes be in pari materia with the proposed new law? If so, how would they interplay? Adapt and answer questions 9 to 11 to any statutes included in question 12.
13. What specific solution do you recommend to remedy the defect you are now considering?
14. Does your solution involve legislative administration or law making in the sense of laying down rules of general application?
15. If the latter, what is the immediate and specific object or purpose of the new law that you propose?
16. What are the likely economic, social and political results and implications of your proposed solution?
17. What are the various sanctions and other devices available for use in attaining the objects of your proposed law?
18. With particular reference to question 17, does the subject matter of your proposed law indicate that it will be self-executory, or must administrative machinery be utilized?
19. What modifying effect, express or implied, will your new law have on presently existing law, both common and statutory?
20. Is there any question concerning the constitutionality of your proposed law:
    (a) under the federal constitution;
    (b) under the constitution of this state?
21. In the light of careful appraisal of your answers to the foregoing questions, do you recommend the enactment of a new law? If so, draft the necessary bill.

## The Cromwell Library

*(Continued from page 516)*

photocopying machine. Subject to copyright restrictions and at cost, the library will furnish copies of law review and bar publication articles or case reports which may not be readily available to you in your own community. Most orders of this kind can be in the mail, on the way back to your office, on the day of receipt at the American Bar Center.

The Clearing House activity of the library has been approved by the Library Services Committee and the Board of Directors of the Foundation as a continuous program. Information is secured from the American law schools on the approved list of the American Bar Association about the unpublished theses and dissertations which have been accepted by the schools during the current academic year. The library also maintains a file on legal research now in progress in the law schools, bar associations and other organized legal professional groups or those groups or associations with interest in law. This information has been published annually in the Foundation's Publication No. 1 and its Supplements A and B. Supplement C will be published this fall. Inquiries by mail are welcome.

The library staff will endeavor to supply copies of published or unpublished bar association committee reports to interested American Bar Association members or to state and local bar associations and will work with the American Bar Association's Co-ordination and Information Services in operating this service feature of the Cromwell Library.

# OUR YOUNGER LAWYERS

William C. Farrer, Secretary and Editor-in-Charge, Los Angeles, Calif.

▪ The 1956 Membership Committee of the Junior Bar Conference has adopted a three-fold program. It features stress upon solicitation of Association members from new admittees to the practice of law, a mopping-up campaign following the American Bar Association's special membership drive for 50,000 new members, and emphasis upon 100 per cent Association membership in law firms throughout the country.

One of the richest sources of memberships, which was ably developed under the leadership of Junior Bar Conference Information Director Thomas E. Taulbee, of Wilmington, Delaware, during his service as Membership Chairman, has been solicitation of those recently admitted to the practice of law. In many states, particularly where formal admission ceremonies are held, membership representatives have contacted new admittees and personally solicited their applications for American Bar Association membership. Co-operation from local membership representatives and Junior Bar groups has produced excellent results. In some instances, however, there are no formal admission ceremonies, or the committee workers have been confronted with certain mechanical difficulties in contacting the admittees, although co-operation of state officials is generally excellent. One of the primary aims of the 1956 Membership Committee continues to be emphasis upon the solicitation of memberships from new admittees to the practice. Local committeemen are encouraged to develop a routine but efficient method for appearing at admission ceremonies and the response is excellent. In some states it has been necessary to develop other means of contacting the admittees. This has entailed considerable work on the part of local representatives and for that reason the United States has been divided into areas where assistance and encouragement can be offered from the Regional Vice Chairmen of the committee: Herbert H. Anderson, of Portland, Oregon; George H. Buschmann, of Washington, D. C.; Julius W. McKay, of Columbia, South Carolina; Alvin E. Meyer, of Indianapolis, Indiana; Ewell E. Murphy, Jr., of Houston, Texas; James L. Oakes, of Brattleboro, Vermont; and C. Robert Simpson, Jr., of Los Angeles, California.

The special membership drive was a great success and the work done by the voluntary workers in that campaign has provided the Membership Committee with an excellent opportunity for further increase in American Bar Association memberships throughout the country. For the first time, wide publicity was disseminated informing the Bar in general of the advantages of membership in the American Bar Association. Not all the lawyers approached during the special drive made application for membership, and the 1956 committee is attempting to follow-up the fine work which has been done and enroll many who did not join when first invited.

The group insurance plan of the American Bar Association has been of great assistance in soliciting members for the Association. Although a medical examination is now required for those over 36 years of age, lawyers of Junior Bar Conference age may still take advantage of the plan without such an examination. The Committee has emphasized the benefits of the insurance plan in soliciting memberships from all sources, and the plan has proved particularly useful in enrolling new admittees and encouraging 100 per cent membership of law firms. In some instances firms have paid the Association dues so that the younger members can take advantage of the insurance plan. In other instances the insurance premiums have been paid by the firms as a part of the organizational expense. In an era wherein insurance plans are often used as an incentive measure, the American Bar Association Plan offers an incentive which is rarely matched.

### *Kentucky Young Lawyers Elect Ewen*

The Annual Meeting of the Young Lawyers Conference of Kentucky was held at Louisville on April 4, 1956. Victor W. Ewen, of Louisville, was elected to serve as President for the year 1956-57; James Chenault, of Richmond, as President-Elect for the year 1957-58; James Gillenwater, of Glasgow, Vice President; and Edward T. Breathitt, Jr., of Hopkinsville, as Secretary. E. Smythe Gambrell, President of the American Bar Association, and Robert G. Storey, Jr., Chairman of the Junior Bar Conference, were featured speakers at the gathering. The meeting was chairmanned by Thomas C. Carroll, of Louisville, President of the Young Lawyers Conference, and his report for the year 1955-56 included as achievements the organization of district bar meetings throughout the state which showed an increase in attendance over prior years; successful participation by Kentucky young lawyers in the Association's special membership drive for 50,000 new members; and the establishment of a minimum fee schedule in Kentucky sponsored by the Young Lawyers Conference. Mr. Carroll served as Sixth Circuit Junior Bar Conference Chairman for the Special Membership Drive; James Chenault, as Kentucky Chairman; and the outstanding campaign in the Louisville metropolitan area was directed by Victor W. Ewen, assisted by Joseph E. Rose, Henry L. Mangeot, John A. McCrea, Nixon C. Duncan, Thomas W. Burke, Charles E. Duncan, Ewing L. Hardy, Jr., William F. Burbank, Lee F.

Swan, Paul F. Schlaudecker and Milton H. Smith III.

### *Michigan Activities Reported By 6th Circuit Councilman*

Miss Rosemary Scott of Grand Rapids, Michigan, Councilman for the Sixth Circuit, reports the following current activities of the Michigan Junior Bar. Junior Bar members of Grand Rapids, Michigan, have participated in a television program "What's the Law" and a radio program "Cross Examination", on both of which a panel of local attorneys pose questions of local interest which promote the Lawyers Reference Service of the Grand Rapids Bar Association. These public relations activities during 1955 resulted in 655 referrals to 131 lawyers participating in the program, with fees from these referrals reported as $28,811.12.

The Public Information Committee of Region 8 of the Michigan Junior Bar, chairmanned by Milton E. Higgs, of Bay City, assisted by G. James Williams and Robert F. McCoy of Midland, and Marshal L. Wilson of Saginaw, has produced a "Meet the Press" type of radio program dealing with state-wide issues such as the authority for turnpikes, highway safety and judicial reform. Another activity of this committee which has attracted wide interest is a ten-weeks' series of lectures devoted to various phases of law, followed by a question and answer period. Participants have included Floyd E. Wetmore, John C. Morris, Jerome C. Kole and Robert F. McCoy, all of the Midland County Bar Association.

The Law Students Committee of the Michigan Junior Bar through its Chairman, Clan Crawford, Jr., of Ann Arbor, has arranged to provide notice of placement opportunities and summer clerkships obtained through the efforts of this committee in each of the four Michigan Law Schools—the University of Michigan, University of Detroit, Detroit College of Law, and Wayne University.

Courier-Journal and Louisville Times

**Officers of the Younger Lawyers Conference of the Kentucky State Bar Association: (left to right) James Gillenwater, Vice President, Glasgow; Victor W. Ewen, President, Louisville; James Chenault, President-Elect, Richmond, and Thomas C. Carroll, Past President, Louisville.**

### *Boston JBC Survey Published*

A subcommitte of the Boston Junior Bar has prepared a comprehensive survey of the comparison between the cost to the young lawyer of Social Security and the cost to him of comparable benefits obtained from private insurance companies, a condensed version of which has been published in the December, 1955, issue of the *Boston Bar Association Bulletin*. Chairman of the Boston Junior Bar Association is Robert S. Zollner.

### *Notice of Elections*

▪ At the Annual Meeting in Dallas in August, 1956, there will be an election for the National Junior Bar Conference offices of Chairman, Vice Chairman, and Secretary, to serve during the calendar year 1957. In addition, Council Representatives will be elected from the following Circuits: Second, Fourth, Sixth, Eighth, Tenth, and the Ninth- and Tenth-at-Large.

On or before June 15, 1956, a nominating petition must be submitted in order for a candidate to be considered by the Nominating Committee for national offices. Petitions for Chairman, Vice Chairman and Secretary must be signed by at least twenty members of the Conference; and petitions for Council Representatives must be signed by at least five members of the Conference from the Circuit affected. All such petitions should be submitted to the Chairman of the Conference, Robert G. Storey, Jr., 27th Floor, Republic National Bank Building, Dallas 1, Texas.

WILLIAM C. FARRER
National Secretary

# Tax Notes

▪ **Prepared by Committee on Publications, Section of Taxation, George D. Webster, Chairman; John S. Nolan, Vice Chairman.**

## *An Executor May Increase the Marital Deduction*

**By Albert B. Bernstein**
**Miami, Florida**

▪ The proper tax treatment of administration expenses by the executor may sometimes operate to increase the marital deduction and thus effect an estate tax saving. Consider the following situation:

Mr. Jones in his will employed the marital deduction formula in providing for his wife, Mary, by bequeathing her an amount equal to 50 per cent of the value of his adjusted gross estate as finally determined for federal estate tax purposes, less the aggregate amount of other property passing to her which qualifies for the marital deduction. The residue of the estate was bequeathed and devised to John, a son of Mr. Jones by a previous marriage. The will provided that all estate and inheritance taxes imposed with respect to any property included in the gross estate should be paid out of the residuary estate.

The gross estate was valued at $660,000 and the debts, claims and administration expenses totaled $60,000. The executor had the election of treating certain administration expenses as income tax deductions under Section 162 or 212, or as estate tax deductions under Section 2053. If he chose to treat the administration expenses as income tax deductions, he would be required under Section 642 (g) to file a statement that the amounts had not been allowed as estate tax deductions and a waiver of the right to have such amounts allowed at any time as estate tax deductions.

The executor determined that the estate would effect an over-all tax savings by taking $30,000 of the administration expenses (one half of the total) as income tax deductions, and he accordingly deducted this amount from income.

Under Section 2056 (c) the maximum marital deduction cannot exceed 50 per cent of the adjusted gross estate. The question therefore arose in the Jones estate whether, in determining the adjusted gross estate, the entire amount of debts, claims and administration expenses ($60,000) should be subtracted from the gross estate ($660,000), leaving an adjusted gross estate of $600,000 or whether only $30,000 ($60,000 less $30,000 of administration expenses claimed as income tax deductions) should be subtracted from the gross estate, leaving an adjusted gross estate of $630,000.

In the first instance, the maximum marital deduction would be $300,000, while in the second instance it would be $315,000. In Rev. Rul. 55-643, 1955-43 IRB 18, the Internal Revenue Service ruled that administration expenses treated as income tax deductions should not be subtracted from the gross estate in order to determine the adjusted gross estate. See also Rev. Rul. 55-225, 1955 IRB 460, which provided for the same result under the 1939 Code. The effect of the formula bequest and the executor's election is to give the surviving spouse more than one half of the net distributable estate, $315,000 instead of $300,000. The executor's election increases the marital deduction, and consequently the share of the widow, by $15,000. While John's share as residuary legatee is thereby decreased, the net loss to him is considerably less than $15,000 because the estate has obtained a $30,000 income tax deduction at the cost of only a $15,000 increase in taxable estate. This tax saving increases the residue. The net over-all effect is an important increase in the distributable estate.

Rev. Rul. 55-643, *supra*, is predicated on the assumption that the increased amount resulting from the election constitutes an "interest in property which . . . passed from the decedent". This conclusion is reached despite the last sentence of Section 2056, which might be interpreted to reach a contrary result. This provides:

> Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of subparagraphs (A) and (B) of subsection (b) (1), be considered as passing from the decedent to a person other than the surviving spouse.

Moreover, the ruling suggests that beneficiaries other than the widow might have the right (under local law) to question the authority of the executor to decrease their interests under the will by increasing the widow's share. The problem would be even more acute if the widow were the executor or one of the executors.

Generally, it is the duty of an executor to administer an estate to the best advantage of all concerned. It would appear that he would be performing this duty by minimizing the taxes of the estate. However, in order to protect the fiduciary (and to avoid mere guessing as to what power he has) it might be advisable to incorporate a provision in the will giving the executor the authority in his discretion to exercise the election to take either income tax deductions or estate tax deductions, whenever the law permits such an election. It might also be advisable, in order to avoid complicated

tax and accounting problems, to add a clause precluding reimbursement or adjustment of the accounts of the estate, or the amounts to which the beneficiaries may be entitled, by reason of the exercise of any such election by the executor. Thus, if John could require an adjustment whereby the widow was forced to reimburse him for part of his net loss, the marital deduction would be decreased and the estate tax increased. These complications might defy solution. In an abundance of caution an order might be obtained from the probate court authorizing the executor to make the election.

Now suppose in the Jones estate all of the facts and figures had been those set forth *supra,* except that the will, instead of incorporating a marital deduction formula bequest, had provided that the residuary estate should go one half to Mrs. Jones and one half to John. Rev. Rul. 55-643, *supra,* states that in such a situation it is presumed that the net value of the interest passing to the widow is one half after payment of all debts and expenses of administration, whether or not deductions therefor are taken as estate tax deductions.

This would mean that there would pass to her only one half of $600,000 ($660,000 less the total debts, claims and administration expenses of $60,000), so that the marital deduction in this case would be $300,000 as against $315,000 when the marital deduction formula bequest was used.

However, it may be that even here the marital deduction could be increased from $300,000 to $315,000. In most states administration expenses are paid out of the principal of the estate. However, if the laws of the Jones' state permit expenses of administration to be paid out of income (there being sufficient income) the executor might assert that the principal of the gross estate ($660,000) had not been reduced by the $30,000 of administration expenses paid out of income but only by the other $30,000 of debts, claims and administration expenses paid out of principal. This would mean that the widow would receive $315,000 of principal and that the marital deduction would be $315,000 instead of $300,000.

Even in the absence of statute this result might properly be reached if the will of Mr. Jones, leaving his widow one half of his estate, should contain a provision that his executor has the option, in his discretion, to pay all or any portion of administration expenses out of income and that there should be no reimbursement or adjustment of the accounts of the estate, or the amounts to which the beneficiaries might be entitled, by reason of the exercise of such option by the executor.

A recent New York case, *Warms' Estate* (Surrogate's Court N.Y. Co., March 4, 1955), 140 N.Y.S. 2d 169, although not discussing the marital deduction, is instructive as to the problem involved in the situations discussed herein. In this case the testator bequeathed two fifths of his residuary estate to two nieces and three fifths of his residuary estate in trust for the benefit of his wife for life, remainder to surviving named legatees. The will directed that estate taxes be paid out of the residuary of the estate.

While the administration expenses were actually paid out of the principal of the residuary estate, the executors, of which the widow was one, exercised their option to deduct administration expenses on the estate's income tax return.

A special guardian appointed to represent infant contingent remaindermen of the residuary trust took the position that, because administration expenses were charged to income in computing taxes by reason of their treatment as income tax deductions, these administration expenses should be charged to income in the estate's accounting and not to principal which would ultimately go to the remaindermen. The court denied this contention, stating that administration expenses are generally payable from principal.

The special guardian claimed in the alternative that, since the administration expenses were in fact charged to principal, the corpus of the residuary trust should be credited with the amount which represents the savings which would have been allocated to said trust if said administration expenses had been deducted from principal as estate tax deductions.

In his alternative claim the special guardian seemed, in effect, to be taking the position that when administration expenses are treated as income tax deductions they reduce the income taxes and thus benefit only the income beneficiaries who are ultimately charged with income taxes and that this is unfair since, if the amount of the administration expenses had been treated as an estate tax deduction, this would have reduced the estate tax and correspondingly increased the principal or corpus of the estate which would ultimately go to the remaindermen. This alternative position of the special guardian was sustained by the court.

The result reached in the *Warms* case seems to emphasize the necessity of incorporating in the will a clause similar to the one suggested to the effect that there should be no reimbursement or adjustment of the accounts of the estate, or the amounts to which the beneficiaries might be entitled, by reason of the exercise of the option by the executor to take estate tax deductions or income tax deductions whenever the law gives the executor such an option.

**Addendum to Note on Charitable Foundations**

The Tax Note in the March, 1956, issue of the JOURNAL was entitled "Control of Closely Held Corporations Through Charitable Foundations" by Francis W. Sams, of Miami, Florida. The note pointed up the ever-present risk of a change in Treasury Department policy in this area, particularly by reference to congressional hearings and reports and to other tax articles in which proposed changes in policy in past years were discussed. It now appears that the Treasury Department is again considering whether it should concede that a charitable foundation may enjoy all its tax exempt benefits where control or affiliation exists between the charitable foundation and a substantial donor. There is a serious doubt that the Government could successfully maintain a contrary position (except possibly in extreme cases) without legislative change, but the risks should be evaluated by counsel.

# Activities of Sections

## SECTION OF JUDICIAL ADMINISTRATION

■ At the Regional Meeting held in Hartford, Connecticut, on Monday, April 16, a pretrial demonstration was conducted under the joint sponsorship of this Section and the Junior Bar.

The Chairman of the Section, Alexander Holtzoff, United States District Judge for the District of Columbia, presided. The demonstration was conducted by Chief Judge Bolitha J. Laws, of the United States District Court for the District of Columbia, and a panel of trial lawyers practicing in that district. The demonstration consisted of pretrials of three actual cases that had been tried in the District of Columbia—a personal injury case, an equity case, and a contract case. There was a large attendance and a great deal of interest and enthusiasm were aroused in pretrial as a result of the demonstration. The panel of counsel consisted of Sidney Goldstein, Paul Connolly, William E. Stewart, Francis W. Hill and David G. Bress, all of Washington, D. C.

## SECTION OF MINERAL LAW

■ The program of the Section of Mineral Law for the Annual Meeting in Dallas has been formulated. Sessions of the Section will be held in Exhibition Hall of the Hotel Adolphus, with the morning session on August 28 to be devoted to the subjects of water rights and certain aspects of the depletion allowance in oil and gas production. The Natural Gas Bill will be the subject of the afternoon session, including an address by a member of Congress and a panel discussion with respect to interests of producers, utilities and consumers.

Wednesday morning's session will be held jointly with the Section of Public Utility Law, highlighted by an address on atomic energy, the speaker to be announced later. The final session of the Section meeting will include reports and election of officers.

In addition, the Section plans to close its activities with a cocktail party and reception on Wednesday evening.

## SECTION OF MUNICIPAL LAW

■ The Section participated in the Northeastern Regional Meeting, Hartford, Connecticut, April 17. The Section was represented officially at the meeting by Chairman David M. Wood.

All members of the Section should now have received the published report of the joint committee on parking. This was distributed recently through the courtesy of the Eno Foundation for Highway Traffic Control, Saugatuck, Connecticut. Those who have joined the Section since the list was submitted at the end of 1955 may obtain a copy by writing direct to the Eno Foundation or by notifying the Secretary of the Section.

## SECTION OF ANTITRUST LAW

■ The annual spring meeting of the Section of Antitrust Law was held at Washington, D.C. on April 5-6, 1956. The dinner meeting at the Mayflower Hotel was attended by Supreme Court Justices Clark and Minton, Attorney General Brownell, Federal Trade Commission Chairman Gwynne, the other four commissioners and a number of other government officials. An elaborate musical program arranged by David C. Murchison, which followed the dinner, was enthusiastically received.

Eight papers were presented by government officials and practicing lawyers, concerning various aspects of the Clayton Act. This portion of the meeting was under the auspices of the Section's Clayton Act committee, of which Professor S. Chesterfield Oppenheim is chairman.

Earl Kintner, chairman of the Section's membership committee, reported a substantial increase in the Section's membership.

Chairman Fuller announced the appointment of a new committee (H. Thomas Austern, chairman) to deal with antitrust aspects of the atomic program.

The next meeting of the Section will be held at Dallas on the mornings of August 28 and 29, and will conclude with a luncheon on August 29. All functions will be held at the Baker Hotel. The speakers at that meeting will devote themselves to anti-trust problems incident to corporations and their subsidiaries and affiliates.

## SECTION OF INSURANCE LAW

■ The Northeastern Regional Meeting of the Section of Insurance Law took place at Hartford on April 17 and was one of the most successful regional meetings which has yet been held.

E. Smythe Gambrell and John D. Randall addressed a breakfast meeting of the Section which approximately 150 members of the Section attended. John T. Faude, of Hartford, was Chairman of the Breakfast Committee.

An all-day trial tactics panel then followed at which 500 members of the Section and their guests were present. W. Percy McDonald, of Memphis, Tennessee, Chairman of the Section, presided.

L. Duncan Lloyd, of Chicago, who

is co-ordinating the Section's program at the Northwest Regional Meeting at Spokane on June 1, has announced that there will be a breakfast meeting that morning at 8 o'clock at the Davenport Hotel. Gordon H. Sweaney, of Seattle, will be the speaker. His subject will be "Current Trends in Insurance".

The breakfast meeting will be followed with a trial tactics panel that morning. Campbell McLaurin, Chief Justice of the Supreme Court of Alberta, Canada, has been named Moderator. Other speakers will be Hugh L. Biggs, Portland; Payne Karr, Seattle; William R. McKelvey, Seattle and Welcome D. Pierson, Oklahoma City. Chairman McDonald will preside at both the breakfast meeting and the trial tactics panel and has stated that a large attendance is anticipated.

# *Practicing Lawyer's guide to the current* LAW MAGAZINES

**Arthur John Keeffe** • Editor-in-Charge

BANKRUPTCY: Readers of this department will recall that not too long ago we noted *Constance* v. *Harvey*, 215 F. 2d 571 (2d Cir. 1954), *certiorari denied* 75 S. Ct. 294. The case concerned Riley's Diner on the roadside in Watervliet, New York (no doubt where the "elite" of "vliet" eat) near Albany, New York, in Albany County, on which a chattel mortage had been given to one Constance to secure a present loan of $20,000. New York, California and many other states require that a chattel mortgage be recorded within a reasonable time. If recording be unreasonably delayed, then the chattel mortgage is void as against creditors who extended credit prior to its recordation. However, as against any creditor who extends credit after the mortgage is recorded, the mortgage is valid. Now, since its amendment in 1950, Section 70c of the Bankruptcy Act, known as the strong-arm clause, vests the trustee in bankruptcy, as of the date of bankruptcy, with all property upon which *a creditor of the bankrupt could have* obtained a lien by legal or equitable means. The trustee is thus vested "*whether or not such a creditor actually exists*". In *Constance* v. *Harvey*, the Town Clerk of Watervliet, New York, failed to record Constance's chattel mortgage on Riley's Diner, so that though the loan was made, there was not a prompt recording of the chattel mortgage on Riley's banquet hall in Watervliet, New York. It seems the Town Clerk thought a filing with the County Clerk of Albany County (which had been done) would suffice, so when asked he did not record but returned the chattel mortgage, marked "Filed in Albany". However, Constance ultimately discovered it and eventually the Town Clerk of Watervliet, New York, recorded his chattel mortgage. The loan to Riley was made by Constance in November, 1949, and that very month his attorney sent the chattel mortgage to the Town Clerk of Watervliet. It was not until ten months later, on October 5, 1950, that the Town Clerk actually recorded it. But Riley did not leave the church and become adjudicated a bankrupt until October 23, 1951, over one year after the chattel mortgage had been validly recorded. And the diner was then his sole asset. It sold for $22,150. Down to the date of recordation Riley remained in the church and no creditor obtained any lien on the diner. Under New York law, of course, any creditor could have levied on Riley's Palace as an asset down to recordation, *but none did*, and after recordation *none could* under New York law. (See Harlan, J. in *Constance* v. *Harvey* at page 574.) Readers will recall that then Judge, now Mr. Justice John Harlan held at the Circuit that under Section 70c of the Bankruptcy Act, since Constance's chattel mortgage was presumably recorded more than four months before the petition in bankruptcy was filed (a fact not established by the record on appeal but one which certainly the Circuit could judicially notice), the lien of the chattel mortgage was valid as against the trustee in bankruptcy. On a petition for rehearing, the Second Circuit, *sua sponte*, reversed, with Mr. Justice Harlan concurring, and held that, since under the *literal* wording of 70c the trustee was vested as of bankruptcy with the lien which any creditor of Riley could have obtained upon any of his property "*whether or not such a creditor actually exists*", the chattel mortgage of Harvey was invalid. The $20,000 loan that Constance had in good faith extended to Riley against a chattel mortgage on his diner, valid under New York law, was thus declared to be an unsecured loan under 70c of the Bankruptcy Act. And this, despite the fact that for over four months before bankruptcy no creditor could have levied on the diner ahead of the chattel mortgage of Constance! Harold Marsh, Jr., Visiting Professor at U.C.L.A. Law School, studies the problem in the March, 1955, *California Law Review* (Vol. 43, No. 1, pages 65-75) in a piece entitled "Constance v. Harvey —The 'Strong Arm Clause' Re-Evaluated." Professor Marsh points out that the same point under 70c will arise with respect to trust receipts, accounts receivable and fraudulent conveyances, *mutatis mutandis* as

the security laws of the states vary from state to state. Apparently, under the Uniform Trust Receipts Act there is no difficulty, which is comforting. Professor Marsh confines his study to California, which requires that assignments of accounts receivable be recorded, and he finds that the unjust result in *Constance* v. *Harvey* will be repeated under the statute. And similarly he finds that under the Uniform Fraudulent Conveyance Act, a similar unjust and ridiculous result will obtain. "It is the thesis of this article that the Court (Harlan, J.) was right the first time" (page 68). And Professor Marsh comments that the "indecision" of the Second Circuit in *Constance* v. *Harvey* "illustrates the difficulty of this question". I rate this remark as the understatement of 1956, but I am compelled to weep that Fowler Harper (see his four famous pieces as to what the Supreme Court did not do in its 1949, 1950, 1951 and 1952 terms, in the *University of Pennsylvania Law Review*, volumes 99 at 293, 100 at 354, 101 at 439 and 102 at 427) did not inquire this year as in prior years why the Supreme Court would deny certiorari in a case of this difficulty and commercial importance. Marsh says:

> It is probably safe to predict that the case of Constance v. Harvey will cause more anguish among secured lenders in some states than any other case since Corn Exchange Bank v. Klauder, although geographically the effect will not be as widespread.

One can instantly see that *Constance* v. *Harvey, supra,* if correctly decided endangers the legality of millions of dollars of secured loans in this country of ours and Professor Marsh's article should, therefore, be on the desk of every banker and banking lawyer in the land. No lawyer can advise as to the validity of a secured loan without consideration of the applicability of the strong-arm clause of Section 70c. And the appropriate committees of our Association will want to study it so as to consider amendatory legislation. Sections of the Bankruptcy Act such as Sections 60 and 70c and 70e should not be amended without careful study. The draftsman of Section 60 of the Chandler Act found this out to his sorrow when he made it applicable to the hypothetical and mythical creditor (see "Sick Sixty" by your editor, John Kelly and Myron Lewis in 1947 in 33 *Cornell Law Quarterly* 99) and it took a long time for our Association to correct Section 60. In view of the difficulty we then experienced with 60 that voided secured liens whether a "creditor actually exists or not", one can only wonder why similar dangerous language was allowed to remain unlimited in Section 70c. Professor Marsh expresses the pious hope once expressed by a distinguished Professor as to Section 60, that the courts will construe 70c as not applicable unless some creditor has actually extended credit during the period between the loan and the valid recordation of the security device. Not even "perfessors" should advise a lender to take such a risk. And although the above unmentioned distinguished Professor once did me the signal honor of calling me a "pixilated pixy" for believing the courts would construe Section 60 literally as written (which a Virginia court did), I am sure no practicing lawyer wants to stick his neck out with a valued client to give any advice with respect to Section 70c contrary to its literal wording and the way it was read by a unanimous Second Circuit on the rehearing in *Constance* v. *Harvey*. The obvious way out is to have our Association study Section 70c and correct it in the grand manner they did Section 60 of the Chandler Act. Incidentally, Professor Marsh contends there is a defect in amended Section 60 (see page 74, footnote 41) and our Association would do well to analyze his complaint, although from my study I doubt the merit of the point he makes. Many weary hours of study of amended 60 has led me to believe that, while complicated in wording, the Association's Committee did a splendid job in its final draft. On the other hand, this piece by Professor Marsh is outstanding, and so impressed am I with his competent and brilliant writing (including a 1952 Columbia graduate thesis on marital property in the conflict of laws on file in the library of the U.S. Supreme Court) that I would hesitate long ere I said he was wrong about anything. (Write California Law Review, Boldt Hall, Berkeley, California, and send $1.50 for this Marsh piece today.)

In deciding as it did, the Second Circuit in *Constance* v. *Harvey, supra,* relied on *Hoffman* v. *Cream-O-Products,* 180 F. 2d 649, *certiorari denied,* 340 U.S. 815, 71 S. Ct. 44, 95 L. ed. 599. Commenting on the decision in *Constance* v. *Harvey,* the note writer in the May, 1955, *New York University Law Review* (Vol. 30, pages 1113-1115) states that the Second Circuit misinterprets the Hoffman decision and,

> by enlarging the trustee's title, has seriously impaired the security interest of creditors who have otherwise complied with the requirements of state law, and thus restores the very evil which Congress sought to overcome by amending Section 60a of the Bankruptcy Act.

You can get a copy of this note of George Spelvin of New York University by writing N.Y.U. Law Review, Vanderbilt Hall, Washington Square South, New York 3, N.Y., and sending two dollars.

*(Continued from page 507)*

### *A Further Look at Lawyers and Accountants*

■ It is easy to understand and to share Dean Griswold's concern over the development of practices in which law and accounting are combined. This is obviously an important part of the problem of relations between lawyers and accountants, though it is far removed from the questions raised in the *Agran* and other cases.

Dean Griswold suggests that there is a connection between this development and the creation of national accounting firms. Since I had become the head of the oldest of these firms before the Sixteenth Amendment was adopted, the newly raised issue has an interest for me which the earlier one did not possess. For such a firm the question of status involved in the *Agran* case hardly exists.

In a series of lectures at the Law School of Northeastern University and in his volume *The 20th Century Capitalist Revolution,* Adolph Berle (Harcourt Brace, New York, 1954) has discussed the problems created by the capitalist revolution that has taken place during the last half century. An outstanding characteristic of this revolution has been a change from the local to the national scale in almost every phase of our economy. Another major feature has been a great transfer of power and jurisdiction from the states to the Federal Government.

Still another feature has been the resort first in business and then in federal legislation to the "independent accountant" to provide a measure of protection to investors in corporations in which beneficial ownership and management are widely separated. By far the greater part of the work required from these accountants (in volume) is the detailed examination of records and related facts; work which must be performed where the assets and records of the enterprise are to be found. Hence there has arisen the accounting firm with offices in the principal centers of the country.

Of all this, there is no hint in Dean Griswold's article. He points out that the form of organization of accounting practice has not followed that of the law, but he does not inquire why this should be so. Nor does he stop to consider that the lawyer whose practice is local is concerned mainly with individuals or small business enterprises; whereas the large corporations with which the national firms of accountants are mainly concerned have lawyers of their own with whom the accountants necessarily co-operate in tax matters, if only from considerations of business prudence. He recognizes that the preparation and substantiation of the tax returns of corporations are primarily the function of the accountant.

Nevertheless, he suggests that the basic issue in the tax field is not between the lawyers and accountants, but is between lawyers and the smaller firms of accountants on the one hand and "several large national accounting firms" on the other, — not, however, all these firms, but only some of them. His discussion of this point seems to me to be quite implausible.

Dean Griswold's appeal is to a tradition (which like most traditions is colored by wishful thinking) not to history. Necessarily so, for the uncomfortable fact is that the Bar in America is not a profession in the traditional sense of the word (nor is accounting). As Mr. Dean Acheson in his recently published apologia wryly observes, the common characteristic of American lawyers of today is that they are all holders of a license to practice. Neither the lawyer nor the accountant is necessarily dependent for his status or privileges on membership in a body of learned persons bound by mutual obligation to maintain high standards of skill, ethics and conduct.

A particular association of lawyers or accountants might forbid its members to engage in combined practice and the only result might be that some members would resign (with their status unimpaired) and join to create an association pledged to the maintenance of the right to practice under both licenses. . . .

It would seem, therefore, that in the tax field only the Treasury or the Congress could take effective steps to forbid the practice of which Dean Griswold and I both disapprove. The same is, I think, true of the issues raised in the *Agran* case. In exercising its power, the authority would naturally give consideration to the reasonable requirements of government and the interests of the taxpayer, as well as to the rights and obligations of lawyers and accountants. Nor need the Treasury fear that either the adminstrative process or the public interest would suffer from a confirmation of the accountant's full rights to appear before it on behalf of taxpayers, for its representatives are entitled, in their discretion, to request legal presentation of any point that arises in a case before them.

I feel that the lawyers were ill-advised to seek limitation of the rights of Certified Public Accountants to practice before the Treasury. There are, however, other phases of the tax problem with respect to which lawyers may have valid grievances against the accountants, or vice versa.

In the matter of combined practice it may well be that it is the lawyers rather than the accountants that are responsible for an unhealthy development. It is a commonplace that many of the worst evils of life are attributable to an excess of zeal in the pursuit of objectives themselves praiseworthy. The unauthorized practice of law movement may be a case in point; some of the committees have perhaps sought to extend privilege beyond reasonable limits and exalt status over competence. On the other hand, if accountants are today drawing legal papers, as Dean Griswold suggests, they are in my view clearly going beyond their proper province.

I have always felt that accountants should recognize that they have two distinct types of functions in tax matters, and that in the determina-

tion of business income theirs is the primary function, but that, in the interpretation of documents in the field of general law, their only function is to assist the lawyer.

They should remember that while business income is an accounting concept and its measurement therefore an accounting function, personal income from other than business sources is not essentially an accounting concept.

Personally I have gone so far as to feel that it was unwise for accountants to appear before the Tax Board and even less desirable they should appear before the Tax Court. I have carried this belief so far as to refuse to appear even when requested by lawyers to do so. However, this is not the place or the time to consider all the tax issues that may arise. My present point is that so far as the issues relate to combined practice of law and accounting or to the question of practice before the Treasury the solution lies in the exercise of a wise discretion by the Treasury Department.

GEORGE O. MAY

Southport, Connecticut

### *Mr. Justice Jackson's Greatest Achievement*

▪ The great tribute paid to Mr. Justice Jackson in the speech of Mr. Gordon Dean cited in your October, 1955, issue would not be complete if one important fact were not mentioned.

The great majority of the American jurists, among them many prominent politicians, regarded the Nuremberg war crime legislation as an unlawful action. The late Senator Robert Taft for instance in his speech on "The Heritage of the English Speaking People", delivered at Kenyon College on October 5, 1946, said: "...we might have discredited the whole idea of justice in Europe for years to come...."

This was the view of the critics:

The London Charter on August 8, 1945, on which the war crimes jurisdiction is based, is *ex post facto* and violates Article I, Section 9, page 3 of the American Constitution. The criticism especially referred to statements made on March 29, 1919, after World War I, by the United States representatives in Versailles, James Brown Scott and Secretary of State Robert Lansing, in the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: "The American representatives believed that the Commission has exceeded its mandate in extending liability to violations of the laws of humanity in as much as the facts to be examined are solely violations of the laws and customs of war. They also believed that the Commission erred in seeking to subject heads of state to trial and punishment by a tribunal to whose jurisdiction they were not subject when the alleged offenses were committed. . . . A judicial tribunal deals only with existing law and administers only existing law.... They were averse to the creation of a new tribunal, of a new penalty which be ex post facto in nature, and thus contrary to an express clause of the Constitution of the United States, and in conflict with the law and the praxis of civilized nations...."

Mr. Justice Jackson took issue with this view in his report to the President of the United States of June 6, 1945, in which he rebutted James Brown Scott, Robert Lansing and all those who were opposed to the new legal order initiated by Jackson: ". . . Nor should such a defense be recognized as the obsolete doctrine that a head of state is immune from legal responsibilities. . . . We do not accept the paradox that legal responsibility should be the least where power is the greatest. . . . With the doctrine of immunity of a head of state usually is coupled another that orders from an official superior protects one who obeys them. . . . It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility."

Here Mr. Justice Jackson arrived at the very central problem of the entire war crime issue. It was the judicial landmark: Introduction of criminal liability of the individual for wrongful acts committed during the course of war.

Jackson boldly took issue with a prejudice, wrongly based on our constitutional law. He recognized that a constitution applies exclusively only to mutual rights and obligations between a government and the persons living under its protection, but never to the lawlessness dominating in the chaos of disruption and violence of a war, where no authority has been able to enact any legislation. Jackson deserves the credit for the fact that on December 11, 1946, the entire membership of the United Nations unanimously affirmed the principles of the International Military Tribunal in Nuremberg. When on August 12, 1949, the United States and fifty-nine other nations signed the "Geneva Convention Relative to the Protection of Civilian Personnel", all the major war crimes committed during World War II were prohibited and declared as punishable. Expressly forbidden are "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . taking of hostages....

Grotius was named as the father of international law for his excellent publication *De Jure Belli et Pacis*, Mr. Justice Jackson initiated and directed the enactment of the international criminal legislation; he should be regarded as the father of this newly created important branch of law.

We may ask: What course would history have taken if the international law provisions negotiated in 1949 in Geneva had been brought into existence after World War I? Would Hitler have received support from persons needed for his ruthless war policy, or would an existing international criminal law not have been a legal, ethical and religious obstacle for obtaining this support without which any planning of a dictator becomes futile?

OTTO E. REIK

Washington, D.C.

*(Continued from page 500)*

ception and banquet and returned me to Sioux Falls in time for the midnight plane. I shall long remember the sweet fellowship of that visit to Sioux Falls and Vermillion.

The meeting in Birmingham of the Board of Commissioners of the Alabama State Bar, under President Francis Inge, reflected that high standard of alertness and responsibility which is to be expected of one of the first Bars to become integrated by law. The cordiality, hospitality and good fellowship of my neighbors to the west are always unbounded.

The University of Chicago is about to erect a magnificent new law building which will occupy an entire block on the Midway next to the American Bar Center. This is welcome news, not only to the immediate constituency of the University, but to American lawyers, jurists and law teachers everywhere. Standing alongside the Bar Center, this great new facility for teaching and research will be of inestimable value to the profession generally. I was happy to join with Chairman Edward Ryerson, Chairman Glen Lloyd, Chancellor Lawrence Kimpton, Dean Edward Levi, and several hundred leading citizens of Chicago and friends of the Law School at a great banquet launching the campaign to marshal needed financial support for the undertaking. Morale was at a high level, and the future of this great institution is bright.

Law Day Exercises of the University of Oklahoma at Norman disclosed prosperity and progress on all sides under the leadership of Dean Earl Sneed, Jr., and his colleagues. I was met at Oklahoma City airport by Lee Thompson and V. J. Bodovitz, who took me to Norman where I joined State Delegate Howard Tumilty, Delegates Charles Duffy, James Fellers, Eugene Ledbetter, and Floyd Rheam, and Judge Alfred Murrah, Judge Stephen Chandler, Hicks Epton, Paul Updegraff, Joe Lewis, and a score of other old friends who made the day most pleasant for me.

The Annual Meeting of the Harvard Law School Association in Cambridge, under the presidency of Judge Raymond Wilkins, demonstrated that the alumni are determined to give that great institution whatever loyalty and support it needs to maintain its position as a national leader in legal education and research. At breakfast, luncheon and dinner, and at the sessions in the forenoon and afternoon, there was the finest fellowship between faculty and former students, all reflecting the capable leadership of Dean Erwin N. Griswold.

At Biloxi, Mississippi, the Louisiana State Bar Association had its Annual Meeting, which it was my happy privilege to attend as a guest of President and Mrs. William Waller Young. The fact that some 500 Louisiana lawyers and their wives journeyed this great distance reflects the spirit of that fine organization. Among the many who had leading parts in the meeting were LeDoux Provosty, former member of our Board of Governors, State Delegate Cuthbert Baldwin and Delegates George Madison and Ben Miller. The gracious Louisianians are perfect hosts.

## American Bar Association Special Train

■ As announced in the January issue (page 79) and the March issue (page 252), arrangements have been completed for Special American Bar Association Pullmans from the East to Dallas, for the Annual Meeting. These Special Pullmans will operate from New York City and Washington, D. C., via the Pennsylvania Railroad, to Chicago, where they will be transferred to the Burlington and placed in the special train to Dallas.

During the layover in Chicago, prior to the departure of the special train at 12:30 P.M., on August 25, chartered buses will be on hand to drive members and guests from the Union Station to the American Bar Center for a visit at headquarters.

The special leaves Chicago at 12:30 P.M., via the Burlington to Kansas City, where it leaves over the M. K. and T. Lines at 9:00 P.M., arriving in Dallas the following morning, Sunday, August 26, at 8:05 o'clock.

For a descriptive folder and reservation blank, please write W. M. Moloney, General Agent, Burlington Route, 105 West Adams Street, Chicago 3, Illinois.

### The Mexican Holiday

This eight-day post-meeting trip, also previously announced, has been enthusiastically received and is almost fully subscribed. There are a few reservations available and application for folder should be made to W. M. Moloney, at address shown above.

*(Continued from page 520)*

official consultation of the chiefs of state. They will come from meetings like this, of men of good will animated by common ideals that transcend national boundaries, where mutual respect, understanding and friendship are fostered.

But there is a more basic purpose that permeates our conference. The lawyer by tradition and training takes as his first concern the preservation of human liberty under law. Our predecessors at the Bar in these lands were the ones who struck the spark that spread throughout the New World, leaving a love of freedom burning in every breast. They led the struggle that made us free, sacrificing their lives and fortunes to the cause. They hewed the framework of government that has preserved for us, their heirs, the blessings of the rule of law.

Today, as the threat of a global holocaust hovers over all, the lawyers of the Western World, charged to justify their glorious heritage, are faced once more by the ancient challenge to human freedom, now in a newer guise. "The destiny of America"—the words are Bolivar's—"The destiny of America has been settled irrevocably . . . the independence of America is required for the equilibrium of the world." The challenge that confronts us is to preserve the independence of our peoples, and to uphold the government of law for all mankind. It has fallen to us, it seems, to determine by our conduct and example whether societies of men are really capable of establishing good government upon sober reflection and voluntary choice, or whether men are forever destined to be oppressed by governments founded upon accident or force.

## A New Threshold . . .
## *A New Dawn of Promise*

Today our countries stand together at the threshhold of a new era, at the dawn of a new day of promise. Ahead is an opportunity for unprecedented human advancement and growth. Before us lie new frontiers of science, education, industry and commerce. New horizons in travel and communication are coming into view. New sources of energy may make man the complete master of his physical environment. To us is offered, in fuller measure than ever before, the promise of a richer and fuller life for ourselves and for those who follow us.

But this bright promise is not undimmed. Man has still to prove the capacity to control, in the political realm, the physical forces that his technology has unleashed. A restive world in bondage must be given a share in the blessings of freedom and abundance. More and more it is borne in upon us by current developments that freedom is not secure unless it is universal; that prosperity is not sound or lasting if it is merely localized or isolated; that civilization is not real or genuine on this earth if it is to be enjoyed by only the favored few.

In the current strife that has set one half the world against the other, the struggle between Communism and freedom is not alone a war of economic and military power. The greater war is the war of ideas, a spiritual conflict of religious and moral values. Our best weapon in this battle is to instill the spirit of freedom and faith in the hearts and minds of people everywhere. Even in this age of discovery, when science has released sources of energy of almost incomprehensible magnitudes, the forces of the physical world still pale in comparison with the power of man's great spiritual and political ideals. It is this power we have invoked to preserve and to spread throughout the world our precious heritage of freedom and order.

In the world-wide clash of ideology, the strongest armor of the western world is the philosophy of law we share and uphold together. When ancient institutions are challenged and traditional ideals attacked, when unforeseen problems must be met and new frontiers must be conquered, we could only flounder blindly and aimlessly without a standard to measure against or a star to guide us. Only in a working philosophy of law and government can we find the essential sense of direction.

So long as we remain free to think for ourselves, we must, each of us, work out our own convictions regarding the functions and purpose of law. But as western advocates we must recognize that law is not devoid of purpose, and that a science of guiding human conduct must take account of the ends to be served and the means to be employed. For us there is no separating of ends and means; for us the law cannot be defined as any rule that will be enforced, nor is law as we conceive of it simply a tool that may be used to remake the world in any image we may choose. We have learned through long experience that the validity and moral authority of a decision rests largely upon the processes and means by which the decision is reached, that the question of guilt cannot be divorced from the fairness of the methods of trial. We know that it is fatuous nonsense to talk about the utopian society without considering how that dream can be realized. In devising a government to protect and to foster the development of human personality and the dignity of man, we have chosen to put our trust more in process and pattern than in unrealistic declarations of the ends of government.

It is the Communists who have traded on common ignorance of these enduring truths, for they have sought to achieve their own version of the millenium through the ruthless and bloody use of sheer physical power. They have closed their eyes to the fact that no good can be accomplished by an evil means, and they have forgotten that the processes of law must leave an indelible mark upon the government wherein they prevail.

It is significant that the dialectic of Marx and Lenin has never produced a coherent philosophy of law.

There is no rational conception of law that could support a state founded upon force and falsehood. How intimately our proud traditions of freedom are bound up with our philosophy of law can be illustrated, I think, if we ask ourselves how the totalitarian regimes behind the Iron Curtain could have been established, or how long they could have endured, if the only tools for the retention of power had been the institutions and processes of the common or the civil law. What passes for law in such regimes is only another convenient instrument of dictatorial authority. To conceive of the individual as existing solely for the exaltation of the state is to deny a place for justice between man and man and between man and his government. So regarded, the individual is not a creature of God free to choose and to will, but only a product of social forces; where all is inevitable and predestined. In such a system, the person who fails to fit into a current political plan is simply to be removed from the community, much as a branch would be pruned from a tree if it upset the symmetry. Individual volition and familiar concepts like the *dolus malus* of the civil law and the *mens rea* of the common law are irrelevant in the totalitarian state. We have only to look to the travesties of justice committed in the so-called People's Courts of the Soviet Union to measure the vast gulf that separates the legal systems of the free world from those of the other half. It is not too much to say that the basic cleavage between the great powers of the world derives ultimately from the conceptions of law that prevail in each.

It would be supposed that the fundamental principles of the separation of powers would find no place in the totalitarian state. The notion that power should offset power to curb the authority of government is simply inadmissible in any philosophy that makes the state all-powerful. Separation of power is the antithesis of dictatorship. It was inevitable then, that Marx and Lenin should reject the use of checks and balances, for their dictatorship of the proletariat was nonetheless a dictatorship. The Communist theory is aptly described by the late Andrei Vishinsky, a leading authority on Soviet law, in these terms, "From top to bottom the Soviet social order is penetrated by the single general spirit of the oneness of the authority of the toiler. The program of the All-Union Communist Party . . . rejects the bourgeois principle of separation of powers."

There is of course nothing remarkable in Vishinsky's statement. Separation of powers relies upon honest differences of opinion among the three co-ordinate branches of government to restrain the unguarded zeal of any single branch. There is no room for such a principle in a political system that tolerates no disagreement and brooks no dissent. In Russia, an independent judiciary would be unthinkable. The courts there exist not to do justice or to protect individual freedom, but only to further the interests of the prevailing power.

The conflict with the enemies of liberty will be won, if at all, by unyielding adherence to the principles of western civilization and by unceasing defense of our cherished ideals. We must lay firm hold on the institutions wrought at such great cost by an earlier generation of lawyers in the Americas. But we must not mistake stagnation for preservation, or changelessness for our national faith. We are all of us creatures of time. Each day marks the end of another page in the eternal story of human growth, and the turning of a new page yet unwritten. Chance and change will never cease, and there is for us no stopping, no turning back. Ours is a process of building, stone by stone, upon the lessons of the past, learning from the tragedies and triumphs of those who have gone before us in the procession of mankind, building ever better for those who are to follow.

The political creed that binds us is premised upon a simple belief: That each human being is a creature of God and endowed by Him with the dignity of individuality. Each must be free to shape his own integrity and to seek his own destiny, to develop and to grow. But growth is change. If each man is to be free to realize his own potential, to think and to build, then change is inexorable. Our peoples have set themselves free—free from physical restraint; free from ignorance and superstition; free from the delusion that rulers possess infinite wisdom; free from political doctrines that held men in bondage to government; free to work out their futures with their own minds and their own hands and in their own way, subject only to limitations that would prevent them from interfering with the freedom of others. In the process of the emancipation of that portion of humanity, there has been released in society a driving force, an individual initiative and an aggregate accomplishment previously unknown to the history of mankind. If we should stifle human growth in the name of security and conservatism, we would defeat the highest purpose of democracy. Whether the realm is intellectual or economic, resourcefulness and innovation must be encouraged and not suppressed. Resistance to change is a product of fear and lack of faith. It has no place among a dynamic people dedicated to the principles of ordered freedom. The cry for security is the call of the fearful and the faithless; the God-fearing man who is self-reliant and conscious of his powers calls for freedom, not security. The real security will be found not in repression, but in giving men free rein for their drives and their capacities. It is one of the paradoxes of labels that in common usage the man who puts his faith in eternal progress and growth is tagged a conservative, while the man who espouses the cause of the unchanging and stagnant social order is counted as a progressive.

Never before have the complexity and diversity of life so defied simplification and solution. Pyramiding scientific and technological advances have made us inextricably de-

pendent upon one another. Each dependence marks a point of contact and constitutes a potential point of conflict. Each addition to our expanding populations increases these points of potential conflict not arithmetically but geometrically, since each new man must depend not upon the one other but upon uncounted numbers of his fellow men. The tasks of the law have increased in proportion, for it is the function of law to ease the points of conflict between man and man and to minimize the inevitable frictions of society. The felt needs of the times have compelled us to concede an increasing role to government in the control of our daily lives. But it is a fundamental article of our mutual faith that we shall not destroy the ancient landmarks in our effort to accomodate the demands for governmental authority to cope with modern problems. The principles of our freedom must stand as fixed and immovable monuments above the ebb and flow of the currents of change. Paramount and above all other considerations, we must channel the flow of progress within the processes and limits of the structure of our form of government; the rule of law must hold firm.

The expanding role of government in the modern world intensifies the challenge to the legal profession whose obligations we bear. To guard the common heritage calls for constant vigil, for ceaseless effort in the cause of freedom. Concentration of power in a central authority tends to diminish the sense of participation in government and the role of local responsibility that fostered the conception of the state as the servant and not the master of the individual, and engendered the spirit that set us free. The flame of freedom may be extinguished unless we re-kindle it with devoted service and unfaltering faith. The demands of efficiency in government regulation also have strained the limits of the doctrine of the separation of powers. In the world of today the functions of government cannot always be neatly assigned to mutually exclusive categories or water tight compartments, and some overlapping at the boundaries must be tolerated. But the resilient and flexible lines must not be broken down. Most important, the independence of the judicial branch must be preserved. The establishment of administrative tribunals outside the judicial power has been carried far in many nations. Freed of the disciplines and restraint the legal profession imposes upon the courts, these tribunals may present grave threats of absolute and unchecked power and the consequent risks of tyranny. It would be tragic indeed should the great freedoms we proclaim be lost through apathy and complacency.

In our eternal endeavor to fulfill the ideal of the rule of law, the measure of our achievement is not absolute success. In human wisdom, we know that the goal is not soon to be won, and that we in our time shall not see the dawn of the day of perfect justice. The battle for liberty can never be won and our arms laid down; there is no final victory. To succeed is only to gain the right to fight again tomorrow.

There are heartening signs that our cause may yet find vindication. Recent years have brought greater stability to our governments, a keener appreciation of fundamentals, and a rejection of alien ideologies. The close of the Second World War found the American republics joined in a solid phalanx against the powers of darkness, and ready to assume their rightful place of leadership in the work of uniting the nations of the world in an organized pursuit of lasting peace. The past week saw the sixty-sixth anniversary of the founding of the Organization of the American States, a day proclaimed by the presidents of nations throughout the Hemisphere as Pan-American Day. Again the vision, the genius and the foresight of Simon Bolivar are called to mind. In his wisdom he recognized the strength of our diversity and local responsibility, and rejected a proposal to make the Western Hemisphere a single nation. These are his words: "It is a grandiose idea to try to make one nation of all the New World, uniting all its parts by a single bond—but it is not possible, because varied climates, diverse situations, contrary interests, and dissimilar characteristics divide America—A great monarchy would be difficult to consolidate, but a great republic is impossible—A state too large in itself or its dependencies finally falls into decadence, loses its free nature, and becomes a tyranny, neglecting the principles which could preserve it, and finally lapses into despotism." But with prophetic accuracy he foresaw the opportunity for a voluntary concord of the separate and independent nations to be formed. "How beautiful it would be", he said, "How beautiful it would be if the Isthmus of Panama should become for us that which the Isthmus of Corinth was for the Greeks. Would that some day we may have the fortune of assembling an august congress of the representatives of the several republics—to meet together and consider the high interests of peace and war."

Today the nations of the New World stand united in the love of liberty as the custodians of freedom for all humanity. It is the Americas that must lead mankind to the new birth of freedom for peoples everywhere. The glorious hopes are futile and the promise of the future will prove vain if we entrust our liberties to the written word alone; the constitution alone is not our salvation. It has fallen to us the lawyers, nurtured in the traditions of government of law and imbued with its spirit, to preserve for all the world the light of human liberty. In our hands we hold the torch that guides the hopes and yearnings of all mankind. In firm resolve we face the solemn duty to keep it burning. The task shall not go undone.

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Henry saw Robert Morris in town. They knew what that meant.[13] They were alarmed for the liberties of men.

On June 9, 1788, Mason sent a copy of his proposed federal bill of rights to General John Lamb, of New York, by Colonel Oswald. On June 21, Judge Robert Yates, of New York, acknowledged receipt of Mason's letter and bill of rights, saying:[14]

> Your letter of the 9th inst. directed to John Lamb, Esquire at New York, Chairman of the federal Republican Committee in that City enclosing your proposed Amendments to the new Constitution, has been by him transmitted to such of the Members of Our Convention, who are in sentiment with him. In consequence of this Communication a Committee has been appointed by the members in Opposition to the New System (of which they have appointed me their Chairman) with a special view to continue our correspondence on this necessary and important Subject.
>
> We are happy to find that your Sentiments with respect to the Amendments correspond so nearly with ours, and that they stand on the Broad Basis of securing the Rights and equally promoting the Happiness of every citizen in the Union.

A copy of Mason's letter to John Lamb has long been catalogued among the *Lamb Papers* in the New York Historical Society, but prior to 1955 no one had ever found and identified the proposed declaration of rights that Mason sent with the letter to General John Lamb.

Early in 1955 the writer found and identified Mason's proposed bill of rights as Item "48" among the "unclassified and undated" *Papers of Gen'l John Lamb* in the New York Historical Society Collection. It is a chunk of "forgotten history". Both the letter and the declaration are in the hand of a scrivener. This proposed bill or declaration supplies the missing link in the history of the Federal Bill of Rights and in the history of liberty in the world. It ends all arguments as to the authorship and principal responsibility for the Federal Bill of Rights. The original in Mason's handwriting from which the scrivener made a verbatim copy, now lies unrecognized, unhonored and unsung among the *Mason Papers* in the Library of Congress. It too is "forgotten history".[14A]

More than two weeks after Mason sent a copy of his proposed bill of rights to New York, an illustrious committee of Virginia gentlemen, including Patrick Henry, James Madison, John Marshall, George Wythe, James Monroe, Mason himself and others, rubber-stamped virtually a verbatim copy of Mason's proposed declaration of rights, in the same twenty paragraphs without rearrangement. On Friday, June 27, the Virginia Ratifying Convention adopted the committee report with a resolution proposing to the First Congress the adoption of that declaration of rights. That committee was not in existence until two weeks after Mason's declaration went to New York.

Copies of Mason's draft mysteriously found their several ways to the North Carolina and the Rhode Island conventions where they were copied also. A comparison of Mason's paragraph 18 with Virginia's 18, North Carolina's 18, Rhode Island's 17 and the corresponding unnumbered paragraph of New York's proposals, reveals that Virginia dropped five words from the Mason original. North Carolina copied the changed version while Rhode Island and New York copied Mason's original, verbatim. They had to have copies of Mason's original before them. Thus the only declarations of rights proposed by any ratifying conventions were almost verbatim copies of that "prepared" by Mason. Four states and the United States rubber-stamped Mason. The Virginia constitutionalist became the American constitutionalist.

The privilege against self-incrimination was stated in Mason's original draft (now kicked around in the Library of Congress; a copy of this draft was mailed to New York on June 9, 1788) as follows:

> 8. That in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation . . . nor can he be compelled to give evidence against himself . . . .

Virginia's Convention rephrased the privilege to make it read like this:

> 8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation . . . nor can he be compelled to give evidence against himself. . . .

(A marked similarity!)

New York *did* do some rephrasing and came up with this proposal:

> That . . . [in] . . . the trial of all crimes cognizable by the judiciary of the United States . . . [etc.] . . . and, that in all criminal prosecutions, the accused ought to be informed of the cause and nature of his accusation . . . and should not be compelled to give evidence against himself.

(This weakened the privilege.)

North Carolina's convention met and proposed amendments and then adjourned and went home. Her proposal of August 1, 1788, was:

> 8. That, in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation . . . nor can he be compelled to give evidence against himself . . . .

(Notice how North Carolina contributed two commas!)

On May 29, 1790, Rhode Island came up with her proposed declaration of rights. The privilege against self-incrimination was stated in her paragraph 8 as follows:[15]

13. On June 12, 1778, Robert Morris wrote to Horatio Gates from Richmond, Virginia (the original signed letter is in the New York Public Library), that he was short of funds and commented on "the depredations on my purse" there in Richmond. Biographers of Robert Morris do not attempt to explain the depredations on the purse of the richest man in America while he was in attendance as an interested observer at the Virginia Ratifying Convention. They "play 'possum" on that one.

14. ALS New York Public Library. NOTE: Rowland lamented the loss of this letter to history. 2 Rowland, LIFE OF GEORGE MASON 280. If she had found and recognized Mason's draft of a Declaration of Rights and this letter Gunston Hall wouldn't be a sight unseen by so many today and George Mason would not be so well unknown.

14A. The first draft of the Declaration of Independence is well guarded. No one may touch it. The Declaration served a noble and temporary purpose but never became living law in America. It was designed to bring France into the war and to memorialize an event. The first draft of our Bill of Rights, which became living law, is unguarded. It may be fondled by patriots or filched by thieves.

15. These proposals may be found in FORMATION OF THE UNION (Government Printing Office, 1927), page 1027, *et seq.*

VIII. That, in all capital and criminal prosecutions a man hath a right to demand the cause and nature of his accusation . . . nor can he be compelled to give evidence against himself . . . .

(Rhode Island shifted a comma and romanized eight. The thing begins to look suspicious!)

On June 8, 1789, James Madison proposed the Bill of Rights in the First Congress to save the political future of James Madison—not to save the liberties of men. As stated by Madison[16] the proposed privilege against self-incrimination was: "No person . . . shall be compelled to be a witness against himself. . . . "

That clothed the *person* with the privilege against compulsion wherever he might find himself.

During the debate on the proposed bill of rights in the Committee of the Whole on August 17, 1789, the following occurred:

> Mr. Lawrence said this clause (meaning the one containing the privilege against self-incrimination) contained a general declaration, in some degree contrary to laws passed. He alluded to that part where a person shall not be compelled to give evidence against himself. He thought it ought to be confined to criminal cases, and moved an amendment for that purpose; which amendment being adopted, the clause as amended was unanimously agreed to by the committee, who then proceeded to the sixth clause . . . .

Mr. Lawrence made it doubly clear that the purpose of his amendment was to confine the privilege against self-incrimination to *"criminal cases"*. The amendment, thus confining the privilege to *"criminal cases"* was "unanimously agreed to by the committee". Is there any question about that? If so, what is it? What words could he have used more suitable to his purpose?

The amendment, as agreed to by the House of Representatives, went to the Senate with the privilege against self-incrimination couched in paragraph 8 as follows (Paragraph "8" is becoming ridiculous): "No person . . . shall be compelled in any criminal case to be a witness against himself."

## The Bill of Rights . . . *Finally Adopted in 1791*

The Senate made substantial changes in many of the House proposals but made no change in the privilege and on September 24, 1789, it was adopted for proposal by the President to the states. Virginia became the eleventh state to ratify, resulting in adoption, on December 15, 1791, and Mason's restless mind was partially composed a few short months before he was buried at Gunston Hall. "With two or three further Amendments . . . I could cheerfully put my Hand and Heart to the New Government", were his last words about it.

As pointed out by C. Dickerman Williams,[17] the assertion of Representative Lawrence, of New York, to the effect that a general privilege against self-incrimination was "in some degree contrary to laws passed", is "mystifying and apparently has never been clarified by scholars". Mr. Williams points out that it has been suggested in 49 *Columbia Law Review* 87-92, that Mr. Lawrence was referring to the Judiciary Act of 1789. That seemed doubtful to Mr. Williams because the Judiciary Act was not approved until September 24, 1789, five weeks *after* Mr. Lawrence proposed the amendment. Very few laws had been "passed" by the First Congress by August, 1789. The lower House of Congress had not "passed" the Judiciary Act until well after August 17, 1789.

The reports of debates in the First Congress left much to be desired. The reporters summarized instead of making verbatim reports of what was actually said. Laws had been "passed" in many of the states authorizing discovery in equitable cases, and authorizing the enforced production of books and papers, as did the Judiciary Act of September, 1789. But, of course, the laws of states could have no relevancy because the plain language of the proposed Bill of Rights imposed limitations and restraints on the Federal Government—not the states.

The sole purpose of the Federal Bill of Rights was to seize the heavy hand of federal power and hold it in a death grip. For example, freedom of religion, of speech, of the press and of assembly are preserved from infringement by an absolute command from the people that "Congress shall make no law respecting . . . " those subjects.[18]

Nevertheless the privilege against self-incrimination was specifically confined to *criminal cases*. If the privilege had been confined to "prosecutions", as Mason had it, it might be applicable to executive and legislative proceedings but the words "criminal case" confines the privilege to judicial proceedings. The executive and legislative branches of government may conceivably take part in a "prosecution" but they can take no part in the trial of a "criminal case", and they could take no such part in 1789. It should be observed that Mr. Lawrence, of New York, did substantially the same thing on the floor of Congress in 1789 that was done in the New York Ratifying Convention in 1788. The proposed privilege was restricted to "crimes cognizable by the judiciary".

History explains. Philosophy confuses. John Dickinson put it this way in the Constitutional Convention of 1787: "Experience must be our only guide. Reason may mislead us."

The process of narrowing privilege and confining it to "criminal cases" is old to history. Neither the New York Convention nor the New York Congressman pioneered. The fruitless demands of the Levellers during the Puritan Revolution were narrowed. Most historians overlook the fact that the American Revolution was a revolution of government on constitutional issues, in which the aspirations of the Levellers in

16. 1 ANNALS OF CONGRESS, 451-452.
17. *Problems of the Fifth Amendment*, 24 FORDHAM LAW REVIEW 32.
18. The peculiar language of the First Amendment was copied from paragraph 11 of the amendments proposed by the New Hampshire Ratifying Convention on June 21, 1788, which was: "Congress shall make no law touching religion, or to infringe the rights of conscience."

the Puritan Revolution of the 1640's became realities. The *American Revolution* was something entirely different from the *British-American War*. The war ended at Yorktown. The Revolution did not subside until December 15, 1791, when the Bill of Rights was adopted. Washington directed the *war*. Mason, more than any other, directed the *Revolution*.

The principles and doctrines of those who assailed the bastions of power in behalf of human liberty and dignity both in the Puritan and in the American Revolutions were expressed in anonymous pamphlets, newspaper articles and circulars before they became the subjects of petitions and remonstrances for the guided multitudes. Those principles that have weighed most in the history of freedom were not promulgated in bound books.

The pamphlets and petitions of John Lilburne, Richard Overton, William Walwyn, and a few others of the 1600's were among the numerous political and revolutionary writings known to George Mason. Those writings were based on the experience of Englishmen. The Virginia Declaration of Rights and hence the Federal Bill of Rights harken back to the anonymous writings of those men. John Locke and others made a fuzzy philosophy of those writings. George Mason translated many of them into shielded *rights*. Mason's ancestors were driven from England to America at the very time when the Levellers were losing the last battle to constitute a government establishing liberty under law—law made by the representatives of the people, which is the *only law* that can be made in a republican government.

The eighth paragraph of the Levellers' petition to Parliament in September, 1648, was:[19]

> 8. That you would have freed all men from being examined against themselves, and from being questioned or punished for doing that against which no law hath been provided.
>
> (The "8" is purely coincidental.)

The privilege against self-incrimination, as then demanded, might have been claimed by a "Digger" (the seventeenth century communist) in a parliamentary investigation as well as in investigations involved in criminal cases. The same sentence proscribed bills of attainder.

In the following December, John Lilburne prepared the *Agreement of the People*, presented to Parliament in January, 1649. The language of the *Agreement* has a familiar ring—because it was familiar to George Mason. It proposed to take from Parliament the power to pass laws touching religion, or "any of the foundations of common right, liberty or safety". It proposed expressly to forbid Parliament to " . . . level men's estates, destroy propriety [*sic*], or make all things common".[20]

Thereupon the *Agreement* continues:[21]

> These things were offered to be inserted in the Agreement, but adjudged fit, as the most imminent grievances, to be redressed by the next Representatives:
>
> 1. It shall not be in their power to punish or cause to be punished any person or persons refusing to answer to questions against themselves in criminal cases.

Thus old John Lilburne, grandfather of the privilege against self-incrimination, finally confined the requested privilege, which was too urgent to await debate and constitutional status, to "criminal cases" so that the "Representatives" of the people might still be free to discover truth in legislative investigations. New York's Convention and her Congressman Lawrence and the first Congress walked in the footsteps of "Freeborn John" Lilburne. History repeats itself without regard to the historical knowledge of the actors.

## The Privilege Narrowed . . . *A Change Between 1776-1789*

Something happened in America between 1776 and 1789 to change the thinking about the privilege of self-incrimination. It was narrowed down in 1789 exactly as the Levellers' demand for it was in 1649. Why did that happen? The question keeps pressing.

*Congressional investigations* are not new. The Continental Congress conducted many during the Revolution. Representatives of the people must know and act upon truth. Otherwise republican government must immediately fail and fall.

One of the *congressional investigations* during the Revolution reads as if torn from the *Congressional Record* of 1954. In August, 1778, Silas Deane had two audiences with the Continental Congress in Philadelphia at the request of the Congress. In other words the Continental Congress *investigated* Silas Deane. His loyalty had been questioned. He was one of the commissioners serving with Benjamin Franklin and Arthur Lee in France, seeking to purchase materials and equipment for the use of our continental forces in the American Revolution. Scores of soldiers of fortune showed up in America with "agreements" signed by Deane entitling many of them to outrank American officers. Thomas Conway was one of them. He conspired to displace Washington as commander in chief. Remember the "Conway Cabal"? The Congress and the harassed continental army staffs were amazed and disgusted. Arthur Lee early suspected the disloyalty of Silas Deane and both he and his brother, William Lee, also in Europe, reported certain facts and circumstances pointing to waste and possible subversion by Deane. Deane was called home to make a report of his stewardship and was displaced at his station in Passy, France, by John Adams.

It appeared to some that Silas

19. Woodhouse, PURITANISM AND LIBERTY (1950) 339.

20. Woodhouse, *supra*, 363. This proposal, persistently urged, accounts for the name "Levellers", applied by the "liberal" advocates of power for the purpose of making Lilburne and his associates odious. See THE LEVELLERS by Thomas Brewster (1659), in COMPLAINT AND REFORM IN ENGLAND (1938) 679. See also page 640. Mason was familiar with these writings—so was John Locke, but Locke lacked the ability to work their truths into a system of government. See his pathetic effort in THE FUNDAMENTAL CONSTITUTIONS AND CAROLINA 1669. 5 Thorpe, CONSTITUTIONS AND CHARTERS 2772. Mason went to original sources. There is no evidence that Mason read Locke. Mason's writings identify many political writers, but never Locke.

21. Woodhouse, page 364.

Deane had surrounded himself with a cell of spies, including the famous spy, Dr. Bancroft, who lived in the same house with Deane and Dr. Franklin, where the brilliant and suspicious Arthur Lee was unwelcome. It was suspected that it was through Bancroft and Deane that the English authorities knew everything that Franklin knew and that Deane knew. England was able to intercept ships bound for America, and her ministers had lists of the cargoes that were found in the holds of those ships. Deane had also entered into a commercial partnership with Robert Morris and was making a nice personal profit out of commercial transactions he was authorized to execute in behalf of the United States.

One fact after another accumulated, but the Continental Congress did nothing from August until December. Deane became nervous and concluded that his best hope was to smear Arthur Lee and his brothers, William Lee, then in Europe, and Richard Henry Lee and Francis Lightfoot Lee then in the Continental Congress. He knew that Arthur Lee had "smelt a rat" in Passy, France. Deane opened up on the Lees and the Continental Congress with diversionary libels, consisting of insinuations and inunendoes and no facts, in the *Pennsylvania Packet* of December 5, 1778.

Thomas Paine, author of *Common Sense* and the fire-brand champion of human liberty, knew the Lees well and knew that no more selfless patriots had ever given of their time, their substance and talents to the cause of American independence. He also knew Silas Deane and Robert Morris. When the attack was made by Deane, Richard Henry and Francis Lightfoot Lee had gone to Virginia, but Tom Paine, then acting Secretary of Foreign Affairs, answered Deane, in the *Pennsylvania Packet* of January 2, 1779. One of the telling blows delivered by Paine was:

> When Mr. Deane had his two audiences with Congress in August last, he objected, or his friends for him, against his answering to questions that might be asked him, and the ground upon which the objection was made, was, because a man could not legally be compelled to answer questions that might tend to criminate himself--yet this is the same Mr. Deane whose address you saw in the Pennsylvania Packet of Dec. 5, signed Silas Deane.

Two of those who rushed into the fray to defend "Silent Silas" were Robert Morris and M. Clarkson. Clarkson was aide-de-camp to General Benedict Arnold, who later became the model and celebrated American traitor and the bosom friend of Deane in London.

The *Journals of the Continental Congress* reveal nothing except the dry bones of the mighty controversy, known as the "Deane Affair". The meat, muscle and blood is in newspaper accounts. It raged in the papers and was known all over America when it was happening during the Revolution, and thereafter. Immediate effects therefrom were the resignation of Henry Laurens as President of the Continental Congress and the dismissal of Tom Paine as Secretary of Foreign Affairs.

Gouverneur Morris, a powerful member of the Congress from New York, and general counsel for Robert Morris, was in the middle of the wrangle on the side of Deane and Robert Morris. In the spring of 1781, it became known that Gouverneur Morris was about to leave Philadelphia with a pass from the Continental Congress and, strange to say, a pass from the British military forces, entitling him to go into New York for the stated purpose of seeing his mother. "A Citizen" writing in the *Freeman's Journal* of June 6, 1781, questioned the propriety of such a trip by a member of Congress, particularly Morris, and directed several queries "to the people of New York". The first and second queries were as follows:

> 1st Whether any and which of their Delegates did urge in Congress, that Mr. Deane should give a verbal narrative of his transactions in Europe, instead of a written one, notwithstanding it was represented in opposition thereto that a verbal narrative, in case he was guilty of the abuses he was suspected of, would leave him at liberty to say and unsay to explain away and evade matters, just as it might best suit the purpose of eluding public justice?
>
> 2nd Whether any, and which of their Delegates urged in Congress that Mr. Deane should be excused from answering questions which tended to criminate himself; a purpose which implies a conviction in the author and abettors of it, that abuses had been committed, and could have no other end than to screen the party from detection?

Those queries stung Gouverneur Morris and kept him on the American side of the battle line. They also brought forth from him a reply in the June 14, 1781, issue of *Freeman's Journal* in part as follows:

> To the first and second queries of the *Citizen* I make this reply. I urged and voted that Mr. Deane should be examined viva voce, and not be permitted to send deliberate written answers from his closet, to written questions proposed by the House; and when he prayed that he might not be bound to answer questions tending to accuse himself, I voted for granting his request. If it were to be done over I would do the same thing even if I believed him to be a villain, which I certainly did not.

Silas Deane was allowed to go back to Europe in 1779 for the asserted purpose of collecting documentary proofs of his innocence. Once there he could never find it convenient to come back home. While in Europe certain of his private letters were intercepted and published that left little doubt to patriots of that day that Deane was playing the part of a loyal subject to his king and a traitor to his country. Old Tom Paine took his revenge in *Freeman's Journal* of March 13, 1782.

On March 20, 1782, the *Freeman's Journal* published "A Modern Glossary for use of strangers in the capitol of Pennsylvania." That Glossary might be useful to a stranger in the capital of the United States today; we therefore quote a portion:

> *Deane, Arnold:*—Unfortunate men with good intentions, drove to despair by American ingratitude.

*Love of our country*:—a joke
*Religion*:—a dream
*Morality*:—a farce.

Dr. Benjamin Franklin would not at first believe the treachery of Deane and Dr. Bancroft. He was a "liberal" philosopher lost in dreams and believed that his friend could do no wrong. The financial power of Robert Morris, the forensic power of Gouverneur Morris, the prestige of Dr. Franklin and the machinations of American Tories were enough to break the back of Henry Laurens, Tom Paine and the great family of Lees.[22]

Writing from Passy, France, on February 28, 1779, after reading Deane's letter in the previous December 5 *Packet*, John Adams told Samuel Cooper:

> The complaint against the family of Lees is a very extraordinary thing indeed. I am no idolater of that family or any other; but I believe their greatest fault is having more men of merit in it than any other family; and if that family fails the American cause or grows unpopular among their fellow citizens, I know not what family or what person will stand the test.

Later Jefferson described Deane as " . . . a wretched monument of the consequences of a departure from right."

On May 15, 1782, George Washington wrote to a friend about Deane: "I have so bad an opinion of . . . [Deane] . . . that I wish to hear or see nothing more of so infamous a character."

John Jay, of New York, one of the contributors to the *Federalist* and the first Chief Justice of the Supreme Court of the United States, at first refused to believe Deane to be a traitor. He led the fight for Deane in the Continental Congress and displaced Henry Laurens, as President of the Continental Congress in 1779 when Laurens resigned because the Congress would not censure Deane for his letter of December 5, 1778. In 1784 Jay, then Minister to Spain, was in London on his way to America. Deane, hearing of Jay's presence in London, went to see his old friend. Jay refused to see him and explained why, in a brief note to Deane, saying in part:

> I was told by more than one, on whose information I thought I could rely, that you received visits from, and was on terms of familiarity with, General Arnold. Every American who gives his hand to that man, in my opinion, pollutes it.

"Guilty by association" was not distasteful to John Jay or to any other patriots in America then. Neither is it today. No better way was known then or is known now for evaluating the character of any one than to judge him by the company he kept or keeps. "Birds of a feather flock together" (unless deflocked by judicial decree and de-feathered by force).

The soft-shell egg-heads, the left-threaded screwballs, the pseudo-philosophers, the assorted "doctors" of this and that, and those simple-minded people who believed themselves "liberal" and "broad-minded" when loving every other country except their own importuned the Congress of the United States for nearly three quarters of a century after 1778 in behalf of Silas Deane, to "correct the injustice" that had been done to the "innocent", yet "Silent Silas". In 1842, the Congress succumbed to the propaganda and appropriated a large sum of money to the descendants of Deane to salve their wounded feelings and to correct the "injustice" that had been done to him.

About twenty-five years after the money was paid out, the secret letters of George III were published. Those letters confirmed the fact that Silas Deane was a traitor to his country beside whom Benedict Arnold was a wingless angel.

Truth crushed to earth does *not* always rise again. Some of the encyclopedias and history books still paint Silas Deane as an American patriot who suffered a great injustice. They accept the gesture of Congress as the final verdict. None of those accounts refer to the letters of George III, the last edition of which was published in 1932. After reading a few of those letters, when first published, Charles Francis Adams, the New England historian, asserted in 1874:

> It appears certain that Deane was more or less in the pay of the government [meaning England] during the war.

But many so-called American "historians" close their eyes to a correction of a cherished fable.

While the Revolution was raging, on March 3, 1781, George III wrote to Lord North requesting him to let Silas Deane have 3000 pounds in goods for America in return for Deane's services in seeking to bring about discord among the confederated states of America and restoring their allegiance to him. "Divide and conquer" was the plan then, as in all ages and Deane was the tool. On July 19, 1781, George III wrote to Lord North expressing fear that Deane was showing his hand and giving "too much appearance of being connected with this country". In another letter George III stated to Lord North that Deane's letters, which were being published in the American newspapers, were "too strong in our favor to bear the appearance of his spontaneous opinions". George III then outlined the kind of letter he thought Deane should write for publication in America.

The only way for Deane apologists to deal with the letters of George III is to ignore them. That is what they do.[23]

Now let us go back to the floor of the First Congress under the new Constitution, on the seventeenth day of August, 1789. Many members of that Congress were members of the Continental Congress before whom Silent Silas appeared in 1778. Richard Henry Lee and Oliver Ellsworth,

22. See, in general, Hendrick, THE LEES OF VIRGINIA, Chapters 11 and 12.

23. See, Hendrick, THE LEES OF VIRGINIA, pages 314, 315. The dated quotations from the *Writings of John Adams* and *George Washington* may be found in their published writings. The undated quotations from Jefferson and John Jay were taken from Hendrick, THE LEES OF VIRGINIA, Chapters 11 and 12. The letters of George III are from the same source. The quotations from newspapers are extracts from microfilms of such newspapers owned by the Library of the University of Georgia, which now has the best collection of microfilms of eighteenth century newspapers in America.

for example, were in the Senate. Elbridge Gerry was in the House with a copy of George Mason's original draft of the Bill of Rights in his pocket. So were many others who remembered full well the treachery of Silas Deane—because they felt it. The one who felt it most, perhaps, was George Washington. He could never think of Valley Forge without thinking of Silas Deane.

Is it any wonder that when Congressman Lawrence, of New York, proposed that the privilege against self-incrimination should be limited to criminal cases no one arose to suggest or urge language that would enable another traitor to claim the privilege against self-incrimination at some other congressional investigation in some other age.[24]

It was not until 1695 that the English Parliament extended the privilege to prisoners charged with treason in England. Torture was being used on spies in England as late as 1673. A distinction between the grant of the privilege in such cases and in ordinary crimes was made in Massachusetts as early as 1642.[25]

Neither before nor since 1789 has the English Parliament permitted persons to claim the privilege against self-incrimination in parliamentary inquiries. Parliament recognized then and recognizes now the principle upon which witnesses are excused from incriminating themselves. The rule of Parliament was then and is now that incriminating evidence given in the Parliament may not be used out-of-doors except with the permission of the Parliament, which is never granted.[26]

What has happened to the Fifth Amendment, so deliberately limited by the Founding Fathers to "criminal cases"? A Supreme Court, writing and deciding without restraint or research, has usurped and exercised the power to amend the Constitution by striking the amendment adopted in Congress on August 17, 1789, and approved by the representatives of the people on December 15, 1791. The Court now holds that under the Fifth Amendment, as amended by the Court,

> A witness *in any proceeding whatsoever* in which testimony is legally required may refuse to answer any question, his answer to which might be used against him in a future criminal proceeding, or which might uncover further evidence against him.[27]

The Supreme Court committed the major aberration in *Counselman* v. *Hitchcock*[28] (grand jury investigation under the Interstate Commerce Act), where the Court by way of *dictum* used the broad language just quoted above from the 1952 annotations of the Constitution and specifically rejected any difference between constitutional provisions that "no person shall be compelled to accuse or furnish evidence against himself", and that "no person shall be compelled in any criminal case to be a witness against himself" (page 562 *et seq.*, and particularly 585). The Court was of the opinion that the substantial differences in language should not bring about any difference in meaning. Next came *McCarthy* v. *Arndstein*[29] (hearing in bankruptcy), where the Court broadly held that the privilege was available in civil cases. Then came the further 1955 stretch to cover hearings in congressional investigations. *Quinn* v. *United States*, *Emspak* v. *United States*, and *Bart* v. *United States*[30]. Intermediate cases of interest are *McGrain* v. *Daugherty*[31] and *Sinclair* v. *United States*.[32]

On January 24, 1857, Congress passed a statute[33] which provided in substance that any person appearing as a witness before a congressional committee should be punished for wilful refusal to answer, and, second, that no person testifying before a committee should be held to answer criminally in any court of justice, for any fact or act touching which he gives testimony, and that no statement made or paper produced by any witness before any committee should be competent testimony in any criminal proceeding against such witness, in any court of justice. The act of January 24, 1857, became Revised Statutes, Sections 102 and 859, currently 2 U.S.C. 192 and 18 U.S.C. 3486 (formerly 28 U.S.C. 634; see *United States* v. *Bryan*[34]) until revised in 1954 by an enlarged immunity act. The act of January 24, 1857, at least as then framed, would appear to have prevented the use of testimony obtained in a congressional investigation in either the federal or state courts (*Brown* v. *Walker*[35], *Adams* v. *Maryland*[36]), because an act of Congress is the supreme law of the land binding on both state and federal courts; hence, in the pursuit of an appropriate constitutional objective (wholly aside from the historically correct meaning of the Fifth Amendment) Congress has it in its power to adopt the practice of the English Parliament, namely excusing no witness from giving self-incriminating testimony, but, as a matter of grace, not consenting that the incriminating testimony shall ever be used against the witness in any court, state or federal[37].

The Lawrence Amendment to the Fifth Amendment translated an old English *Privilege of Parliament* into an American *Privilege of Congress*. That "privilege", approved in the manner provided by the Constitution, has been destroyed in a manner forbidden by the Constitution.

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24. The Sixth Amendment guarantees that "In all criminal prosecutions the accused shall enjoy a speedy and public trial, by an impartial jury". To entitle one to a jury trial it must be in a "criminal prosecution". To entitle one to the privilege against self-incrimination it must be in a "criminal case". *If "criminal prosecution" is as broad in meaning as "criminal case", as everyone must concede, then how may the privilege against self-incrimination be validly claimed except in criminal cases triable before juries?*

25. *History of the Privilege Against Self-Incrimination*, 21 VIRGINIA LAW REVIEW 778, and citations.

26. *Problems of the Fifth Amendment*, by C. Dickerman Williams, 24 FORDHAM LAW REVIEW 32, citing Cushing, LEX PARLIAMENTERIA AMERICANA, §1001 (2d edition 1866).

27. CONSTITUTION OF THE UNITED STATES, revised and annotated (Government Printing Office, 1952), page 841.

28. 142 U.S. 547 (1891).

29. 266 U.S. 34, 40 (1924).

30. 349 U.S. 155, 190, 219 (1954).

31. 273 U.S. 135, 167-8, 176 (1926).

32. 279 U.S. 263 (1928).

33. 11 Stat. 155.

34. 339 U.S. 323, 337-8 (1949).

35. 161 U.S. 591, 606 (1896).

36. 347 U.S. 179 (1953).

37. *In re Ullman*, 128 F. Supp. 617, 221 F. 2d 760, sustaining the Immunity Act of 1954. Certiorari granted.

After the foregoing was written, the Immunity Act of 1954 was sustained by the United States Supreme Court, seven to two, on March 26, 1956, in the *Ullman* case, the majority adhering to *Brown* v. *Walker*, *supra*, the

minority building on the historically incorrect views of the minority in *Brown* v. *Walker*. Of course, there can be no question of the correctness of the majority decision, even though predicated on the erroneous historical background of *Counselman* v. *Hitchcock*. Under the correct historical view, the Fifth Amendment never did apply to congressional hearings; and so there could be no serious constitutional question concerning the power of Congress under the "necessary and proper" clause, as a matter of grace, to adopt the English practice of granting immunity whenever Congress is pursuing an appropriate constitutional purpose.

It may be confidently predicted that lawyers, both North and South, will lift their eyebrows over the statement in the majority decision in the *Ullman* case: "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."

Close to the acme of judicial amendment of the Constitution is the decision in *Slochower* v. *Board of Education*, decided by the United States Supreme Court on April 9, 1956, in which, reversing the New York courts, it was held that it was a violation of the due process clause of the Fourteenth Amendment for a New York City public institution of higher learning to discharge a professor pursuant to an express provision of the New York City Charter for having invoked the Fifth Amendment before a congressional committee. Indeed, how outmoded was the thinking of the Founding Fathers when they limited the privilege to "any criminal case"! Now, notwithstanding Mr. Justice Holmes' famous epigram, when still a Massachusetts judge, in *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220, 29 N. E. 517, that petitioner "has no constitutional right to be a policeman" (cited as late as 1946 in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 99), a person now appears to have a constitutional right to be a teacher although he violates a specific public regulation conditioning his employment on not invoking the Fifth Amendment. See also the excellent statement of Lassing J., in *Scholl* v. *Bell*, 125 Ky. 750, 102 S. W. 248 (1907), quoted approvingly by Wigmore, *supra*, §2251. There was a time when the Court held that the action of a state in prescribing the conditions on which public work should be done suggest only considerations of policy with which the courts have no concern. *Heim* v. *McCall*, 239 U.S. 175 (1915); *Stephenson* v. *Binford*, 287 U.S. 251, 276.

What has happened to the Fifth Amendment is the building of bad judicial precedent on bad judicial precedent far away from the words and the intent of the Founders. The writer suggests the pertinence of the classic statement that "a frequent recurrence to fundamental principles is essential to the perpetuity of free government".

However, the present Supreme Court, in the light of its general orientation, may perhaps be expected to hold that the Court has so often amended the Fifth Amendment and so often decided against its true intent that it cannot now return to first principles and to the clear and simple language of the Founding Fathers. Still it must be conceded that frequent affirmance of a constitutional construction has not deterred the Court when, without even lip-service to *stare decisis*, it wills otherwise. One notes a most recent instance in the *School Segregation Cases* (discussed in April, 1956, issue of the JOURNAL) in which the Court blandly brushed aside the *unanimous decision* made in 1927, when, affirming the Supreme Court of Mississippi in *Gong Lum* v. *Rice*, 275 U.S. 78, it ruled that the school segregation involved was "the same question which has been many times decided to be within the constitutional power of the state legislature to settle without the intervention of the federal courts under the Federal Constitution"—the *unanimous* Court being composed of Chief Justice Taft and Justices Holmes, Brandeis, Stone, Van DeVanter, McReynolds, Sutherland, Butler, and Sanford. Speaking parenthetically, shall we now expect further amendment by the Court by the upsetting as "outmoded" of the many century-old state laws against mixed marriages, the prevention or diminution of which is only one of numerous completely rational bases for segregated schools?

It can hardly be gainsaid that rewriting and amending the Constitution in one's own image, rather than seeking the intent of the framers of its provisions, and requiring lawful resort to the established amendment procedure, seems to be the order of the day.

Certainly the Fifth Amendment has not escaped.

## Separation of Powers in India

*(Continued from page 555)*

another ground by the Supreme Court in *Ram Prasad* v. *The State of Bihar*, A.I.R. [1953] Supreme Court 215.

Legislation amounting to adjudication of a particular dispute may, however, violate the guarantee of equal protection of the laws and equality before the law under Articles 14 and 15 of the Constitution, and may be void on that account. This is what happened in *Ameerunnissa* v. *Mahboob Begum*, A.I.R. [1953] Supreme Court 91. The facts of that case are interesting. On the death of Nawab Waliuddowla, a nobleman of the Hyderabad State, disputes arose regarding succession to his property, and, to put an end to those disputes, an act known as the Waliuddowla Succession Act of 1950 was passed by the Hyderabad State, whereby the claims of succession put forward by Mahboob Begum and Kadiran Begum, two of the alleged widows of the late Nawab, and their children, were dismissed. These two ladies as well as their children filed a petition before the Hyderabad High Court under Article 226 of the Constitution on the ground that the Act was void under Articles 14, 19 and 31 of the Constitution. The High Court of Hyderabad accepted the petition and on appeal the Supreme Court agreed with the view of the Hyderabad High Court that the Act was void on the ground of violation of the equality clause. It is strange that no attack was made on the validity of the Act on the ground of the doctrine of separation of powers, and it seems that the counsel for the petitioners did not think it worthwhile to advance any argument in that direction.

In *Ram Prasad* v. *The State of Bihar*, A.I.R. [1953] Supreme Court 215, the Bihar Sathi Lands (Restoration) Act 1950 (Bihar Act 34 of 1950), was held to be void on the ground of violation of the equality clause. The Act in question was passed with the object of declaring the settlement of certain lands known as Sathi lands in the Champaran district to be void and restoring the lands in question to the Bettiah Wards estate. The petitioners who had obtained possession under the settlement challenged the validity of the Act on the ground that in passing the impugned legislation the Bihar legislature actually usurped the power of the judiciary and the enactment was not a law at all, and further, that the Act was void as it conflicted with Articles 14 and 19 of the Constitution. The Supreme Court held the act to be void on the ground that the legislature had singled out two individuals and denied them the right that every Indian citizen possesses to have his rights adjudicated upon by judicial tribunals in accordance with law which applied to his case. The court, however, thought it unnecessary to embark upon a discussion as to how far the doctrine of separation of powers applied in India and whether the legislature can arrogate to itself the powers of the judiciary and proceed to decide disputes between private parties by making a declaration of the rights of one against the other (see A.I.R. [1953] Supreme Court 215, 219).

The conclusion that emerges from this discussion is this:

1. The Indian Constitution does not contain any formal declaration of the doctrine of separation of powers.

2. The Indian Constitution, in its actual provisions, does not exhibit any scrupulous regard for the doctrine of separation of powers.

3. Legislation in India cannot be declared to be void merely on the ground that it amounts to adjudication. The authority on this point is not very strong, but in principle this appears to be the position.

4. Legislation amounting to adju-

dication may, however, be held to be void if it discriminates against any person or group without justification. This has been established conclusively by two decisions of the Supreme Court. In practice it will be difficult for the legislature to escape successfully an attack on this ground.

5. Legislation amounting to adjudication may further be held to be void on the ground that it takes away property without compensation or unreasonably restrains the enjoyment of property; see Articles 19 and 31 of the Constitution. This has not been decided by the Supreme Court, but is a fairly plausible ground of attack.

6. An act of the legislature which purports to confer on the executive a wide legislative power may be held to be void on the ground of an undue delegation of powers. This is sometimes regarded as a branch of the doctrine of separation of powers, but it has to be kept separate.

7. If the executive assumes judicial functions or is vested with judicial function by any act, such an assumption or vesting cannot be void merely on the ground of the doctrine of separation of powers, though it is difficult to conceive of many cases where the executive can exercise the judicial function without express legislation authorizing it to do so. Such legislation would presumably be valid if it is otherwise in accordance with the Constitution.

8. If the judiciary assumes legislative or executive functions, such an assumption would be void, not on any theoretical basis, but on the general principle that a court cannot exercise powers not conferred upon it by law.

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## The Federal Courts in 1955

*(Continued from page 552)*

es notwithstanding the provision for discretionary jury trial made by Rule 71A(h) of the Federal Rules of Civil Procedure.

The committee reported to the Conference that a revised edition of the handbook for petit jurors, which had previously been approved by the Conference had been distributed throughout the judiciary for use in all the district courts. It also received a report on the cost of the operation of the jury system.

The report of Chief Judge Charles E. Clark, of the Second Circuit, as Chairman of the Conference Committee on Judicial Statistics, stated that during the spring of 1955, twenty-eight district court judges had co-operated with the Committee by keeping diaries for a three-month period, of the amount of time they spent in court and chambers on individual cases and that this project had substantiated information obtained from previous studies as to the relatively large amount of judicial time required for the disposition of private litigation as opposed to cases in which the United States is a party.

### *Pre-Trial Procedure*

Circuit Judge Alfred P. Murrah, of the Tenth Circuit, the Chairman of the Conference Committee on Pre-Trial Procedure, reported to the Conference on behalf of his Committee, a proposed resolution which the Conference adopted, to authorize the Chief Justice to appoint a panel of district judges, consisting of one or more from each circuit, to study the special problems of pre-trial in long complicated cases and to meet in conference for that purpose. The resolution contemplates that hereafter, in antitrust and similar protracted litigation, one of the judges of this panel be made available to the judge who will try the case, on his request, for consultation and to sit jointly with him at pre-trial conferences.

### *Reconstitution of Conference Committees*

Finally, the Conference undertook a major reorganization of its committee system, whereby all existing committees were discharged and the Chief Justice was authorized, with assistance from certain members of the Conference, to appoint, reappoint, or reconstitute, such committees as might seem appropriate. The report of the Chief Justice states that under this authorization the revised committee structure of the Conference is as follows:

*Advisory Committee*—Mr. Chief Justice Earl Warren, Chairman.

*Committee on Supporting Personnel*—Chief Judge John Biggs, Jr., Chairman.

*Committee on Revision of the Laws*—Circuit Judge Albert B. Maris, Chairman.

*Committee on Air Conditioning of Court Quarters*—Chief Judge John J. Parker, Chairman.

*Committee on the Administration of the Criminal Law*—Chief Judge John J. Parker, Chairman.

*Committee on Judicial Statistics*—Chief Judge Charles E. Clark, Chairman.

*Committee on the Operation of the Jury System*—Chief Judge Harry E. Watkins, Chairman.

*Committee on Bankruptcy Administration*—Chief Judge Orie L. Phillips, Chairman.

*Committee on Pre-Trial Procedure*—Circuit Judge Alfred P. Murrah, Chairman.

*Committee on Court Administration*—Chief Judge John Biggs, Jr., Chairman.

According to the report, the Conference took a recess, subject to the call of the Chief Justice, on September 20, 1955.

### *The Director's Report*

The annual report of Henry P. Chandler, the Director of the Administrative Office of the United States Courts, for the year ending June 30, 1955, dated September, 1955, which had been presented to the Judicial Conference at the opening of its September Session, includes a detailed report by the Division of Procedural Studies and Statistics on the movement of cases and the nature of the judicial business throughout the Federal District Courts, the Courts of Appeals and the Special Courts. This is summarized in the report of the Chief Justice, *supra*. In addition, the Director discusses a number of other aspects of the judicial business.

### *Court Appropriations*

Commenting upon the financial provisions for the courts in the current and next fiscal year, Mr. Chandler says:

> . . . As was shown in my last report the added funds for the courts provided in the appropriations for 1955 were not commensurate with the increase in the number of judges provided for by the law approved February 10, 1954 or the proportion of them serving in the fiscal year 1955. Consequently it was not possible to provide the courts in 1955 with the number of supporting personnel or the impersonal facilities which they needed for effective service.
>
> Fortunately, with one or two exceptions, this is not true of the appropriations for 1956. Funds are granted which are adequate for the increase in the number of judges, and beyond that will make better provision for the operating expenses of the courts of appeals and the district courts. I am glad to acknowledge this support given to the courts by the Congress in the appropriations for 1956.
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> • • •
>
> Although as shown the appropriations for 1956 measurably increase the previous provision . . . nevertheless they fall short of the amounts necessary to enable the courts to operate with the highest efficiency. Further increases in the staffs of both the clerks of courts and the probation offices, also in the funds for travel and other impersonal facilities will be recommended to the Judicial Conference and if it approves, to the Congress in the estimates for the annual appropriations for 1957. Especially in a time when . . . the courts, and particularly the district courts, are laboring under excessive burdens, it is only reasonable to grant to them all the supporting personnel, office equipment, and funds for official travel that will be helpful. . . .

### *Judicial Personnel*

In connection with the increased cost of the federal courts, a tabulation of their total personnel as of June 30, 1955, is of interest (see next column).

Reporting on legislation of the past year affecting court personnel, Mr. Chandler mentioned the benefits to the courts of the 7½ per cent salary increase provided generally

| Judges | 1955 | 1954 | 1955 | 1954 |
|---|---|---|---|---|
| Circuit | 63 | 65 | | |
| District | 235 | 226 | | |
| Miscellaneous Courts | 18 | 17 | | |
| Territorial Courts | 12 | 12 | | |
| Retired - resigned | 50 | 46 | | |
| | 378 | 366 | 378 | 366 |
| Secretaries to judges | | | 280 | 267 |
| Secretary-law clerks to judges | | | 7 | 7 |
| Secretaries to retired judges | | | 20 | 15 |
| Law clerks to judges | | | 225 | 205 |
| Law clerks to retired judges | | | 6 | 6 |
| Total personnel for clerks' offices | | | 1156 (a) | 1145 |
| Members of the probation staffs | 1955 | 1954 | | |
| Probation officers | 311 | 316 | | |
| Probation clerks | 217 | 223 | | |
| | 528 | 539 | 528 | 539 |
| United States Commissioners | | | 664 | 656 |
| Clerical assistants to U.S. Commissioners | | | 4 | (b) |
| United States park commissioners | | | 13 | 12 |
| Members of the staffs of the | 1955 | 1954 | | |
| referees in bankruptcy | | | | |
| Referees | 157 | 161 | | |
| Clerks | 403 | 360 | | |
| | 560 | 521 | 560 | 521 |
| Court criers | | | 192 | 178 |
| Court reporters | | | 226 | 216 |
| Court reporter-secretaries | | | 17 | 16 |
| Court reporter-probation clerk | | | 1 | 1 |
| Court reporter-law clerks | | | 2 | 2 |
| Supporting personnel of the miscellaneous courts | | | 141 (c) | 130 |
| Miscellaneous personnel in the District of Columbia | | | 86 (d) | 120 (e) |
| Miscellaneous personnel in other districts | | | (f) | 4 |
| Messengers in courts of appeals other than that of the District of Columbia | | | (g) | 10 |
| Librarians | | | 21 | (h) |
| Nurses | | | 4 | (i) |
| Interpreters | | | 3 | (h) |
| Messengers | | | 34 (j) | (k) |
| Members of the staff of the Administrative Office | | | 114 | 114 |
| Totals* | | | 4,682 | 4,530 |

(a) Includes personnel paid from "Fund C" (48 U.S.C. 106) not previously included (29 employes).
(b) Previously included in miscellaneous personnel in the District of Columbia.
(c) Includes 11 commissioners of the Court of Claims, not previously included.
(d) Excludes messengers, librarians, employees of the U.S. Commissioner for the District of Columbia, and nurses, previously included in this category, now shown separately.
(e) Includes 26 messengers; 2 librarians; 2 employees of the U.S. Commissioner for the District of Columbia; and 2 nurses.
(f) Reported separately below.
(g) Included with messengers below.
(h) Included in miscellaneous personnel in other districts. Librarians for courts of appeals included under total personnel for clerks' offices.
(i) 2 nurses included under miscellaneous personnel for the District of Columbia and 1 nurse not previously counted.
(j) Includes 1 messenger in the Virgin Islands not previously counted.
(k) Reported under messengers in courts of appeals other than that of the District of Columbia.
* Permanent and temporary personnel are included in the above totals.

for all federal employees,[1] the law increasing travel allowances from $9 to $12 a day (except for judges who receive not over $15 a day) and for motor travel, from 7 to 10 cents a mile[2] and a law relieving officers of the judicial branch who are required to give fidelity bonds from the cost of premiums.[3]

### *Court Quarters*

Mr. Chandler recounts in some detail recent increases in court facilities to accommodate the thirty additional judges provided by Congress in 1955. This involved an expenditure of almost $3,000,000 and extensive alterations in many federal buildings. He also outlines the work of the Administrative Office in collaboration with the Public Buildings Administration to carry out the Conference program for the air conditioning of court quarters previously mentioned herein. Commenting on the need for this, he says:

> In former generations when the business of the federal courts was much less, it was possible for them to dispose of most of it in the seasons of the year when the heat is not immoderate. But at the present time when the business has greatly expanded the courts cannot handle it without working through a considerable part of the summer. Suitable conditions in the court quarters during that season for all concerned, the public as well as the court staffs, are a necessary element in any plan to overcome congestion and delay.

### *The Bankruptcy Administration*

Mr. Chandler reports that the number of Referees in Bankruptcy increased in 1955 from 161 (64 full time and 97 part time) to 165 (75 full time and 90 part time) at the end. Thus there have been only two more positions of this character added since the 163 authorized when the Salaried Referee System was inaugurated in 1947. Yet in 1955, the number of cases terminated was 8746 more than the previous year and was the highest number terminated in any year since the salary system began. This, Mr. Chandler says, was made possible in part by a substantial increase in the number of clerical positions in Referees' offices. He points out that:

> It has been said many times before but perhaps should be emphasized, that appropriations for the salaries and expenses of the referees in bankruptcy do not fall upon the general funds of the Treasury or the taxpayers so long as the special funds for salaries and expenses derived from the charges paid by the parties to bankruptcy proceedings are sufficient. Year by year for many years the receipts into the special funds have been more than sufficient and surpluses have been accruing.

The report also speaks of the recommendation of the Judicial Conference for legislation (H.R. 791, 84th Cong.), to increase from $12,500 to $15,000 the maximum annual salaries of full time referees and from $6,000 to $7,500 the maximum annual salary for part time referees and he states, in this connection, the need for prompt enactment of this proposal.

### *The Probation System*

A large part of Mr. Chandler's report is devoted to the work of the Probation Officers in the federal courts. On June 30, 1955, there were 30,075 persons under their supervision. Of these, 22,428 were probationers, 5,006 were parolees, 1,391 were persons on conditional release and 1,256 were military parolees. This was an increase over the previous year and resulted in an average caseload of about ninety-five per officer. The Probation Officers also made 29,754 pre-sentence investigations for the courts, an increase of almost 1,500 over the previous year.

Commenting on the growing use of the Youthful Offender Statute (18 U.S.C. 1510) which sent to the Youth Correction Division of the

1. Pub. Law 94, 84th Cong.
2. Pub. Law 189, 84th Cong.
3. Pub. Law 323, 84th Cong.

Parole Board 465 cases in 1955, Mr. Chandler says:

> . . . when more and more youth offenders come to the stage of being released on parole the amount of attention necessary from the probation officers will increase. The pre-parole investigation upon the basis of which parole may be granted or denied will need to be searching, and especially full and illuminating reports on the progress during parole will be requisite to enable the Board of Parole to decide whether parolees may judiciously be discharged.

Statistics in the report regarding the proportion of probation and parole violations compared to the previous year show that for the first time in recent years the proportion decreased. Also of interest are comparative figures on the cost per year of probation and imprisonment, showing the former to be $97.37 as compared with $1,343 for the latter; and the report of earnings of the 14,725 probationers employed in profitable jobs in 1955, which aggregated $39,760,078 or $2,700 on the average.

Mr. Chandler emphasizes that the most notable development in federal probation in many years is the interest in its improvement generated by a report on juvenile delinquency made in 1955 by a subcommittee of the Senate Judiciary Committee which stresses the lower expense and consequent economy of probation in cases to which it is adapted, and points out defects in the present system and steps that should be taken to cure them.[4] These recommendations include reduction of caseload per officer by increasing their numbers, strict observance of existing educational and experience qualifications for appointment of new officers and increases in salary scales. This report has resulted in a large increase of $440,000 in the appropriation to the courts for probation. The report recommends the establishment of policies for the use of probation designed to meet the views of the Senate Committee.

### *Legislative Report*

The report also mentions the beneficial effects of a recent act (Public Law 9, 84th Congress) increasing the salaries of federal judges. About this Mr. Chandler says:

> This has brought relief to many judges from strain upon the family finances that was wearing and a constant source of anxiety. Also the recognition that it expressed of the important place of the courts in the government, has raised the morale of the judicial force. The successful outcome would not have been possible except for the strong and unflagging support of the legislation by the organized bar and the virtually unanimous opinion of the public of all vocations and classes that it was right.

Mr. Chandler urges the enactment of pending legislation sponsored by the Judicial Conference to limit the review by habeas corpus of state court criminal convictions (H. R. 5649, House Report No. 1200, 84th Cong.) and of the Judicial Conference proposals to provide for the payment of compensation to counsel to represent poor persons charged with crime. Concerning the latter recommendation, he says:

> Persons who are concerned for an effective administration of criminal justice in the federal courts must continue to strive for some suitable law to provide for compensating moderately persons who are appointed to represent poor persons accused of crime in the federal courts, either by the appointment of a public defender in districts in which the number of persons to be defended warrants and the court desires, or by paying compensation in accordance with some reasonable plan to counsel appointed in particular cases. In no other way can the provision of the Sixth Amendment of the Federal Constitution that a person accused of crime shall be entitled to have the "assistance of counsel for his defence", be fulfilled for accused persons financially unable to employ counsel for themselves.

### *The Need for Additional Judgeships*

The report of the Director concludes with a plea for the provision of more judges to reduce the serious calendar congestion and delays in cases in the federal courts.

His remarks on this subject deserve the emphasis of quotation:

> When the backlog of cases in a district court gets beyond reasonable bounds it is very difficult for that court to regain a condition of currency. We deplore the present congestion in civil cases in a number of the metropolitan districts. A sorry fact is that unless the judgepower in a number of other districts is soon increased there will be more courts with backlogs hanging like millstones around their necks. This means concretely loss to litigants, sometimes acute, through circumstances which will not brook delay. It means also too often that the judges in those districts in the strain and anxiety of an effort which is really hopeless, to carry their overheavy burden, impair their vigor and effectiveness for the long run.
>
> It is clear from the statistics that the federal district judges have measurably increased their output per judge in the last fifteen years. The number of civil cases terminated on the average by each district judge increased from 196 in 1941 to 236 in 1955, an increase of 20.4 percent. The decline in currency springs from the fact that in the same period the number of civil cases filed for each district judge on the average increased from 195 to 238. The performance of the judges merits re-enforcement commensurate with the increase in the business which comes to them to handle.
>
> Doubtless there are other improvements in procedure and judicial administration which will be helpful. They are being discussed at the conferences of the federal judges in the circuits and studied by committees of the Judicial Conference and the Judicial Conference itself. But whatever other measures may be taken, an increase in the number of judges for courts selected on the basis of need is indispensable. Such an increase can come only from the Congress to which for the litigants and the public whom they serve, the courts appeal.

4. Sen. Rep. 1064, 83d Cong. and 61, 84th Cong.

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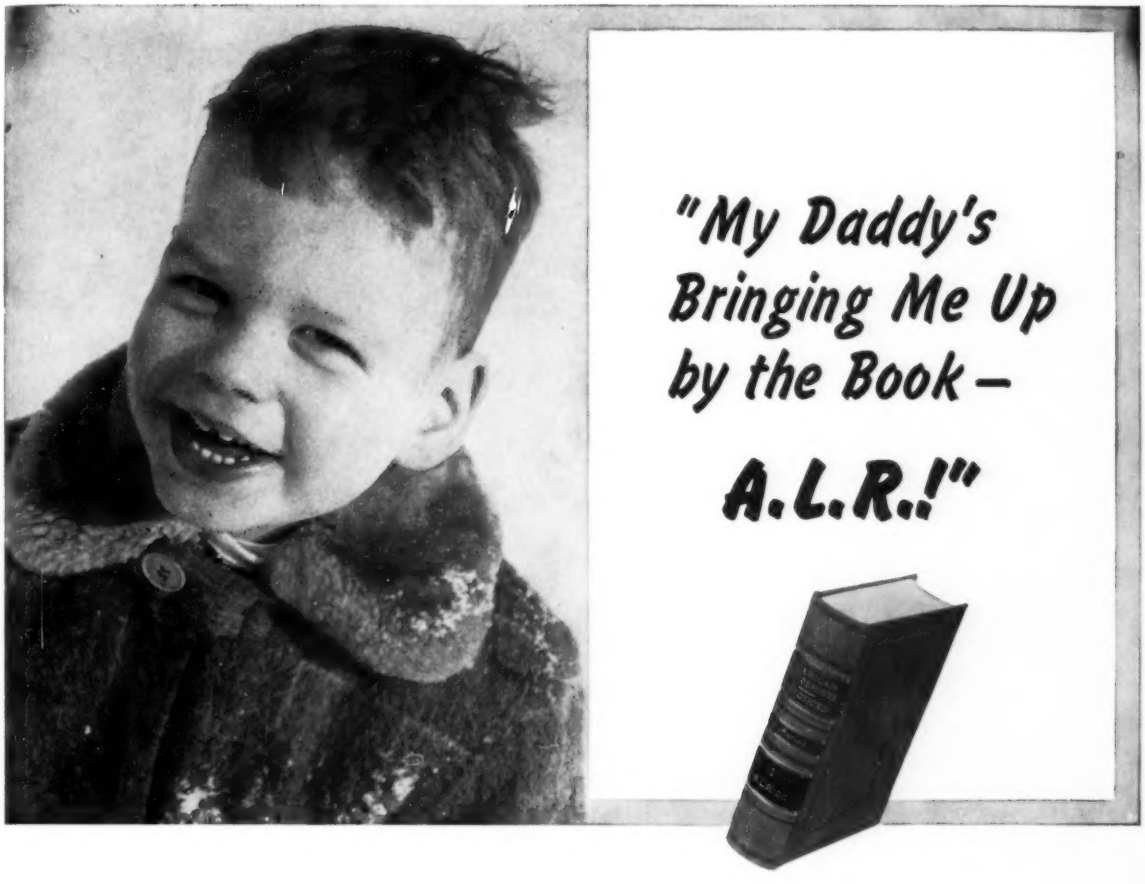


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